

ENTERED

F 2302

San Francisco Law Library

436 CITY HALL


No. 161577.

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

2977

No. 15167

United States
Court of Appeals

for the Ninth Circuit

See Vol. 2976

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOCAL No. 1400, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO, and LOS ANGELES
COUNTY DISTRICT COUNCIL OF CAR-
PENTERS, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMER-
ICA, AFL-CIO and LOCAL 1046 UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO and
SAN BERNARDINO AND RIVERSIDE
COUNTIES DISTRICT COUNCIL OF
CARPENTERS, Respondents.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 449 to 846, inclusive)

Petition For Enforcement of an Order of the
National Labor Relations Board

FILED

DEC 28 1956

No. 15167

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

LOCAL No. 1400, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO, and LOS ANGELES
COUNTY DISTRICT COUNCIL OF CAR-
PENTERS, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMER-
ICA, AFL-CIO and LOCAL 1046 UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO and
SAN BERNARDINO AND RIVERSIDE
COUNTIES DISTRICT COUNCIL OF
CARPENTERS, Respondents.

Transcript of Record

In Two Volumes
VOLUME II.

(Pages 449 to 846, inclusive)

Petition For Enforcement of an Order of the
National Labor Relations Board

(Testimony of Albert Wayne.)

Q. Do you know whether Pardee Construction Company No. 2 engaged in any construction work during 1953?

A. They were in the process of completing one job under contract that I know of. Actually, to expand on that, there is one job I am thinking of in addition. They were contractors on several other tracts, too, so they had a fee on some other tracts so I would say, actually, there would be more than one job.

Q. Now, did you see that Pardee Construction Company No. 2 completed a contract in 1953?

A. That is correct.

Q. Had they been in business prior to 1953?

A. To the best of my knowledge, they had been.

Q. Do you know whether Pardee Construction Company No. 2 was established after the death of Mr. George M. Pardee, Sr.? [335]

A. That is correct.

Q. When was the death of George M. Pardee, Sr.?

A. To the best of my knowledge, I think it was June 6, 1952.

Q. Now, do you know what Francisco Park in Las Vegas is? A. Yes, I do.

Q. Tell us what it is.

A. Francisco Park is a fictitious name of a tract that has been developed in the City of Las Vegas, Nevada.

Q. By whom was it developed?

(Testimony of Albert Wayne.)

A. Well, if I understand your question correctly, do you mean who owns it?

Q. That is about it.

A. The Pardee-Phillips of Las Vegas.

Q. And who constructed it?

A. The Pardee Construction Company of Las Vegas.

Q. And do you know the cost of the construction of Francisco Park?

A. Well, I have the figure here that represents the construction cost of the dwellings themselves up to the end of June of 1954.

Is that the figure you want?

Q. Just one minute. Yes, will you give us that figure, please?

A. The figure I have is two million——

Mr. Nicoson: Just a minute. I want to object to this testimony first upon the grounds there is no proper foundation [336] having been laid. Two, hearsay, not the best evidence, not binding upon respondents.

Trial Examiner: Overruled.

Mr. Nicoson: May our objection run to this entire line of questions?

Trial Examiner: Yes. The objection is overruled.

Q. (By Mr. Heimann): Give us the figure, please. A. Yes, \$2,042,189.22.

Q. Do you know when the construction of the dwellings at Francisco Park was started?

A. As I recall, they were commenced in, I think, October of 1953.

(Testimony of Albert Wayne.)

Trial Examiner: Was that project completed?

The Witness: Yes, sir, it's complete at this date.

Q. (By Mr. Heimann): Was it completed in June of '54? A. No, not in June, '54.

Q. You gave us the figure up to June, '54?

A. Yes. Actually, we have considered the project complete as of the end of June. For all purposes necessary, it was completed at the end of June.

Q. Now, do you know what College Park No. 1 and College Park No. 2 is? A. Yes, sir, I do.

Q. Tell us what it is or what they are.

A. College Park is a fictitious name for a housing [337] development in the City of North Las Vegas, Nevada.

Q. And who owns, are these housing developments both of them owned by the same party?

A. I'm sorry, I don't understand.

Trial Examiner: Who owns them?

The Witness: The owner of College Park North is Pardee-Phillips of Nevada.

Trial Examiner: Who owns the other ones?

Q. (By Mr. Heimann): Isn't that College Park No. 1 and College Park No. 2?

A. College Park Tract No. 1 and No. 2 is owned by the Pardee-Phillips of Nevada and referred to as College Park North.

Q. I see. By whom were the buildings constructed?

A. Pardee Construction Company of Las Vegas.

Q. Is the project complete?

A. To the best of my knowledge, no, it is not.

(Testimony of Albert Wayne.)

Q. Do you have the figure of the construction cost of the dwellings at College Park North?

A. Yes, I have.

Q. Would you indicate for what period that is?

Mr. Nicoson: Same objection, same reason.

Trial Examiner: Overruled.

Mr. Nicoson: May my objection run to the entire line of questions?

Trial Examiner: Yes. Objection overruled. [338]

* * * * *

The Witness: It's from the inception of construction to about August 15, 1954.

Trial Examiner: Let's have the date when it was started. You said the inception. That is approximately when?

The Witness: I'm afraid I can't indicate the month. I know sometime in the early part of this year. I'm sorry, I can't recall the month. We have so many.

Q. (By Mr. Heimann): The early part of this year? A. Yes.

Q. The figures extend to when?

A. Recently, August 15 we prepared the cost report.

Q. And what is that figure? A. \$846,395.16.

Q. Now, of the figure that you gave us for three million seven hundred and ten thousand and some more which represents the construction cost by Pardee Construction Company as you indicated, do you know approximately how much of that figure was expended for lumber?

* * * * *

(Testimony of Albert Wayne.)

The Witness: No. [339]

* * * * *

Trial Examiner: Those figures that you gave us, that is the lump sum including material and labor?

The Witness: That's right, sir.

Q. (By Mr. Heimann): That is for the construction of buildings, is it?

A. Well, houses, yes, sir.

Q. Houses, residence houses?

A. That is correct.

Q. Do you know approximately what part of the total construction cost of the houses is for lumber?

Mr. Nicoson: I have to object. May he answer that yes or no?

Trial Examiner: Yes or no.

The Witness: No, not offhand.

Q. (By Mr. Heimann): You don't have any, you don't even know approximately what part?

A. No.

Mr. Nicoson: Objected to as leading the witness improperly. He says he don't know.

Trial Examiner: Overruled.

Mr. Heimann: The answer is no.

Trial Examiner: He hasn't got those figures with him.

The Witness: That's correct. [340]

* * * * *

PROCEEDINGS

Trial Examiner Miller: The hearing will be in order.

Let the record show that the Trial Examiner now presiding is Maurice M. Miller. I have been designated to continue the hearing in this matter in Cases No. 21-CB-548 and 21-CB-600 by the Associate Chief Trial Examiner in San Francisco pursuant to the authority delegated to him under Section 102.34 of the Rules and Regulations in view of the unavailability of Trial Examiner Myers. [348]

* * * * *

FRANK E. BOYCE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Heimann): What is your name?

A. Frank E. Boyce, B-o-y-c-e.

Q. Your address, Mr. Boyce?

A. 1714 South Grand Boulevard, San Fernando, California.

Q. What is your occupation, Mr. Boyce?

A. Labor relations director.

Q. For and by whom are you employed?

A. Associated General Contractors.

Q. And how long have you functioned in that capacity?

A. I have been employed by the Association since 1942. [370]

Q. And what was your position in '42?

A. Assistant labor relations director.

(Testimony of Frank E. Boyce.)

Q. When did you become labor relations director?
A. I'm not so sure of the year.

Q. Approximately?

A. Approximately '47, I believe.

Q. All right. And would you tell us in brief what your functions are as labor relations director for the AGC and what they were as assistant labor relations director for that organization?

A. Yes. My functions were to take the agreement after it had been completely negotiated and administer it according to its paragraphs and so forth. If the contractor has, may have difficulties, they call into the office to check to see what the agreement said for proper interpretations. That is mainly the functions.

Q. Have you had any part in the negotiation of agreements?

A. I have never had any part of the negotiations until this year, that I ever took any part in the negotiations.

Q. Prior to this year have you attended the negotiations of the contract?

A. Yes. [371]

* * * * *

Q. Have you attended the bulk of the negotiation meetings every year since you have become labor relations director?

A. I think so, I think that is right.

* * * * *

Mr. Heimann: I think the question is clear since I asked if he attended the bulk of the negotiation

(Testimony of Frank E. Boyce.)

meetings every year by which I meant did you attend every year the bulk of the negotiation meetings? [372]

The Witness: I would have to answer that in this way, that I did attend some of the meetings of the negotiations every year.

Q. (By Mr. Heimann): All right. Was that true also in your position as assistant labor relations director? A. Yes.

Q. Now, has the AGC issued in past years booklets containing copies of the contracts which had been reached or concluded between the AGC and various labor organizations? A. Yes. [373]

* * * * *

Q. (By Mr. Heimann): Did the AGC in 1946 issue a booklet containing its labor contract with various building and construction trades unions?

A. It has every year. I would say, yes, it has every year. * * * * * [379]

Q. (By Mr. Heimann): In following that suggestion, I show the witness a document which has previously been marked as G.C. No. 3 for identification and I ask him if he can tell us what that is.

A. Well, I believe it is the 1953 agreement which we put out.

Trial Examiner: When you say the 1953 agreement, do you mean an agreement fully executed in 1953 or the agreement put out by AGC as the agreement in effect in 1953? I mean is that agreement which came into existence in 1953 or an agree-

(Testimony of Frank E. Boyce.)

ment which whenever it came into existence was used in 1953, that is what I'm trying to get at.

The Witness: I don't know. I'd have to do a little studying on it.

Trial Examiner: I assume from your general demeanor [405] and your previous responses that the physical object which now confronts you is one with which you are familiar in your capacity as labor relations director of AGC, I mean you have seen either this particular document or one closely resembling it before?

The Witness: That's right.

Trial Examiner: Very well. Now, on the basis of your familiarity with this document, or other purported copies of it, I will ask you whether this document or, rather, the purported agreement contained in it, came into existence in its entirety for the first time in 1953 so far as you know or whether it was in existence so far as you know and being observed on the jobs of member contractors prior to 1953?

The Witness: This, I couldn't answer until I checked in my own office. I think the statement would be right.

Trial Examiner: Which statement?

The Witness: That this is the agreement of 1953.

Trial Examiner: This is the agreement that was put out by AGC as——

The Witness: As of June 1, 1953. [406]

* * * * *

WILLIAM E. COOMBS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Heimann): State your full name.

A. William E. Coombs.

Q. And your address?

A. My business address is 449 South Beaudry, B-e-a-u-d-r-y, Los Angeles.

Q. What is your occupation?

A. I am controller of Ford J. Twaits Company.

Q. How long have you been the controller of that company? [415]

A. Since March of 1952.

* * * * *

Q. Would you tell us in brief what your function is as controller?

A. General controller, chief financial officer, has charge of control of the funds and accounting and tax matters, that general type of thing. Usually, also, combines the function of office manager, as mine did.

* * * * *

Q. (By Mr. Heimann): Mr. Coombs, do you know whether Ford J. Twaits Company is a member of the Associated General Contractors?

A. Yes.

Q. Is the answer yes that they are a member?

A. Yes, they are a member of the Associated General Contractors.

(Testimony of William E. Coombs.)

Q. Do you know whether in 1953 and in 1954 the Ford J. [416] Twaits Company was a signatory to a collective bargaining agreement between the Associated General Contractors and various building and construction labor organizations?

* * * * *

A. I'm not going to answer that yes or no because I don't have any, I don't know of my own knowledge. I have never seen the actual signatures although it is my understanding that is the case, that we are signatories.

Mr. Nicoson: I move to strike out what his understanding is.

Trial Examiner: I will permit the counsel for General Counsel to proceed to lay a basis for the witness' understanding and later will rule on it.

Q. (By Mr. Heimann): Will you tell us what the basis of this understanding is?

A. I'm normally included in the general discussions of company policy and company activity. In those discussions, the company is regularly referred to as a signatory to that agreement. Labor relations as such are not a portion of my function but, naturally, I have to know in some respect the contracts to which the company is a party.

Q. Was it mentioned in those discussions that you referred [417] to whether or not Ford J. Twaits Company operated under that contract?

A. That is definitely the case. It was mentioned and we did so operate.

Mr. Nicoson: I move to strike out the last por-

(Testimony of William E. Coombs.)

tion of the testimony "we did so operate" as not being responsive to the question.

Trial Examiner: Motion to strike denied.

Q. (By Mr. Heimann): Now, Mr. Coombs, did Ford J. Twaits Company during the last two years perform construction work in the vicinity of Twenty-Nine Palms Artillery Range?

Mr. Nicoson: First, I want to object on the ground immaterial, irrelevant, incomplete and, second, I want to object to it on the grounds there is no foundation having been laid as to his having any knowledge of any construction work of this company except in a general financial way and, secondly, the question calls for hearsay, at least, on the state of the present posture of the witness' testimony.

Trial Examiner: I'm going to ask you to lay the foundation first, Mr. Heimann.

Mr. Heimann: All right.

Q. (By Mr. Heimann): Mr. Coombs, do contracts that are awarded to Ford J. Twaits Company come in your possession and to your knowledge? A. Yes. [418]

Mr. Nicoson: Pardon me, I move to strike the answer for the purpose of interposing an objection. The objection is it assumes a fact not in evidence that contracts come into existence at Ford J. Twaits Company, or whatever the company is.

Trial Examiner: The motion to strike denied.

Q. (By Mr. Heimann): Do you have or have you had in your possession a contract regarding

(Testimony of William E. Coombs.)

the construction at an Artillery Range in the vicinity of Twenty-Nine Palms?

A. Yes, I have such contracts in my possession.

Q. Were those contracts awarded to Ford J. Twaits Company either in whole or in part?

Mr. Nicoson: Objected to as not the best evidence. The contract speaks for itself if there is such a contract. He *he* has it.

Trial Examiner: Objection overruled.

The Witness: Will you repeat the question, please?

Q. (By Mr. Heimann): Were those contracts or this contract, whatever it is, awarded to the Ford J. Twaits Company either in whole or in part?

A. As a member of a joint venture, it was awarded. The contract, to expand that a little bit, the contracts of which I testified a moment ago were contracts awarded by the United States Navy to a joint venture consisting of Ford J. Twaits Company, Morrison-Knudsen Company, Inc., and Macco Corporation [419] as joint ventures.

* * * * *

Mr. Nicoson: I'm perfectly willing to have you assume such control and I ask you to do so and I want this witness admonished that he answer the question and avoid giving voluntary informative things which go beyond the scope of the question.

I move to strike the answer as being volunteered [420] testimony on the part of this witness with respect to this question and if I have made any

(Testimony of William E. Coombs.)

error, I think if you have the record read back to you, you will find what this witness is testifying to is not in response to the question. He asked a very simple question whether or not this company was in whole or in part a contractor. That question simply could have been answered yes or no. He didn't stop there, he goes into a big long array of information which the question does not call for.

Trial Examiner: Just a minute, Mr. Nicoson. Technically, you are absolutely correct. The witness' answer did include material above and beyond the bare answer to the question asked but the material offered was not a digression. It was germane. It is relevant to the general line of inquiry.

I can see no useful purpose to be served in this proceeding when that is the case by the presentation for strict enforcement of this rule with respect to responsive answers.

Technically, you are correct. The question went beyond a responsive answer but when the material added by the witness is germane and would have conceivably been elicited in the logical order of proof by a following question, I see no reason to strike on that ground.

I think that merely elaborates the record unnecessarily and I intend to follow that principle in future rulings on [421] objections based on alleged unresponsive character of the answer. If the volunteered material is actually a digression, I will entertain a motion to strike on that ground. [422]

* * * * *

(Testimony of William E. Coombs.)

Q. (By Mr. Heimann): Mr. Coombs, did the joint venture have a sponsoring partner or a sponsor? [423]

A. Yes.

Mr. Nicoson: I object to that on the ground it calls for a conclusion, legal conclusion of the witness. He is asking first if a joint venture and now is asking if it had a sponsor. If those things are in writing, I will also object to it on the grounds it is not the best evidence. He has testified he has the contract, has the contract in his possession. Now, why doesn't he——

* * * * *

Q. (By Mr. Heimann): Mr. Coombs, did the joint venture have [424] a sponsor or a sponsoring partner? A. Yes.

Mr. Nicoson: Objected to on the grounds——

Trial Examiner: I have the objection in mind. For the record, the objection is overruled.

Q. (By Mr. Heimann): Will you repeat your answer? A. Yes.

Q. Was it a sponsor or sponsoring partner or what is the expression?

Mr. Nicoson: Same objection.

Trial Examiner: Overruled.

The Witness: The term is "sponsor."

Q. (By Mr. Heimann): Who was the sponsor in that joint venture?

A. Ford J. Twaits Company.

Mr. Nicoson: Objection. May I have an objection to all of this, your Honor?

(Testimony of William E. Coombs.)

Trial Examiner: You may have a continuing objection.

Mr. Nicoson: On the same grounds.

Trial Examiner: On the same grounds. The objection is overruled.

Q. (By Mr. Heimann): Would you tell us what the sponsorship involved?

A. The sponsor of the joint venture is roughly comparable to a managing partner in that the sponsor is responsible for [425] the direct management of the contract job.

Q. How many contracts were awarded by the Navy to this joint venture regarding construction at the Artillery Range at Twenty-Nine Palms?

A. Six.

Mr. Nicoson: I have to object, no foundation having been laid as to his knowledge about this. Further, on the grounds, immaterial, irrelevant and incompetent, further, calls for evidence of the contract which is the best evidence.

Trial Examiner: Overruled. [426]

* * * * *

Q. (By Mr. Heimann): Before I ask you to consult the contracts, Mr. Coombs, I ask if you have any records showing [427] the amounts involved in these contracts, either the exact or approximate amount.

A. I have before me a financial statement prepared under my supervision which shows the earned revenues at March 31, 1954, at which time the contracts were substantially completed.

(Testimony of William E. Coombs.)

Q. All right. Would you tell us first when the performance of these contracts started, approximately?

* * * * *

The Witness: The first of the six contracts is dated April 15, 1952, and operations under that contract were started within a few days after that date.

Q. (By Mr. Heimann): Would you tell us what the financial statement that you have just referred to shows as the net revenues by March 31, 1954, from these contracts?

Mr. Nicoson: Objected to on the grounds it is obviously not the best evidence. He has a financial statement right there in front of him and there is no reason, at least, yet [428] advanced why that statement can't be put into the evidence.

Trial Examiner: Overruled.

The Witness: The total revenue as of March 31, 1954, for the six contracts is shown on the financial statement as \$12,894,880.00.

* * * * *

Q. (By Mr. Heimann): You stated before, if I remember correctly and correct me if I'm wrong, that these contracts were substantially completed on March 31, 1954?

A. Substantially so, yes.

Q. Do you know which, if any, of the contracts was not completed?

A. Contract No. NOy 74048 was still not completed at that time, at that date.

(Testimony of William E. Coombs.)

Q. Does your financial statement show the amount of revenue that derives from that contract?

A. As of that date, there was \$1,223,746.00 earned revenue from that contract. According to the financial statement.

Q. Now, this one million and two hundred and some thousand dollars, does that constitute revenue from operations of that contract that were actually completed? A. That is correct. [429]

Q. Now, Mr. Coombs, are you familiar with the nature of the work that was done at this Artillery Range pursuant to these contracts?

A. In a general way, yes.

Q. Would you tell us the basis on which you are familiar with that?

A. In the first place, I made numerous trips to the job. In the second place, I had to be familiar with at least the various buildings and structures that were being erected so that I could make an intelligent inspection of the records.

Q. Would you tell us what the nature of that work was that was performed at Twenty-Nine Palms?

A. It was the construction of a more or less complete military camp with barracks and mess halls, bachelor officers' quarters, administration building, warehouses, two chapels, a theater, the usual roads and utilities and electrical installations that go with that type of installation.

Q. Do you know for whom this military camp was constructed?

(Testimony of William E. Coombs.)

A. The contract was with the United States Navy and the——

Q. When you say the contract was “with the United States Navy,” does that mean that it was awarded by the United States Navy?

A. That is correct.

Q. I see. Go ahead, please.

A. The title of the contract is Construction of Training [430] Facilities for Marine Corps Artillery Training. The last time I was on the job, there were about 10,000 Marines there so I take it that it was for the Marine Corps.

Q. When you read the title of that contract, that was the title of one contract?

A. That was the title of the contract which we were talking about a few moments ago and which Mr. Nicoson inspected.

Q. Would you tell us the titles of the other contracts? A. Yes. One at a time.

Trial Examiner: Do you wish to inspect them as the witness refers to them?

Mr. Nicoson: Just so I’m sure that my record is being made properly, I understand my objection which I made a while ago is running to all this examination?

Trial Examiner: Which one?

Mr. Nicoson: That it is incompetent, irrelevant, immaterial, is not the best evidence, is hearsay, no proper foundations have been laid for any of this testimony. I thought we had an understanding on that a while ago.

(Testimony of William E. Coombs.)

Trial Examiner: We had had an understanding as to a continuing objection to another line which was terminated. I will for the sake of the record note the objection from this point forward and overrule the objection. Go ahead.

The Witness: I have here another document entitled Duplicate Original Contract No y 74122. The title of that contract—— [431]

Q. (By Mr. Heimann): For the record, would you indicate so we get the nomenclature right, I believe the “N” and “O” are capitals and the “y” is a small letter, is that right?

A. That is correct.

* * * * *

A. The title I just referred to NO y 1722, additional buildings, Third Increment, Marine Corps Training Center, Twenty-Nine Palms, California.

Shall I continue reading until I’m through?

Q. Yes.

A. I have another contract document entitled Duplicate Original, Contract No. NO y 74076. The title to that is Additional Buildings, Second Increment at the Marine Corps Training Center, Twenty-Nine Palms, California. [432]

I also have another contract document entitled Duplicate Original, Contract No. NO y 74038. The title of this contract is Nonpotable Water Distribution System and Potable Water Storage at the Marine Corps Artillery Range Training Facilities, Twenty-Nine Palms Area, California.

Original Duplicate, Contract No. NO y 74037,

(Testimony of William E. Coombs.)

Main Electric Substation Construction of Training Facilities at Marine Corps Artillery Training, Twenty-Nine Palms Area, California.

Another Duplicate Original, Contract No. NO y 74048, Additional Buildings and Construction of Training Facilities for Marine Corps Artillery Training at Twenty-Nine Palms Area, California.

I believe that is all six of them. [433]

* * * * *

Trial Examiner: Just a minute. In effect, you are doing something more than making your suggestion. As I understand, you are asking for a statement from the General Counsel as to the theory upon which he believes this line of inquiry as to this witness and possibly other similar testimony from other witnesses may be relevant?

Mr. Garrett: I think Pardee Construction may belong to an employers organization but it is my best information they don't belong to the same employers organization that the witness' firm does.

Mr. Heimann: That is correct. I will state that for the record. [435]

Mr. Garrett: Well, now, that is correct? [436]

* * * * *

Q. (By Mr. Heimann): Mr. Coombs, I believe you indicated and correct me if I'm wrong, that you at various times performed, observed the performance of the work at Twenty-Nine Palms?

A. That's correct. [449]

Q. On the basis of this observation and on the basis of your knowledge gleaned as the controller

(Testimony of William E. Coombs.)

of Ford J. Twaits Company, do you know whether the work was performed by the joint venture pursuant and in adherence to the master labor agreement between the AGC and various building and construction trades unions?

* * * * *

The Witness: Yes. [450]

* * * * *

Q. (By Mr. Heimann): Mr. Coombs, on what is your knowledge based?

A. My knowledge of the method of operation, or the knowledge of operation under the master labor agreement?

Trial Examiner: Your knowledge as to the manner and extent of operation under the master labor agreement, as I understood it.

Mr. Heimann: That's right.

The Witness: We are provided by the company with copies of the master labor agreement and it is part of my job to see that, at least, insofar as hiring and firing practices are concerned, that those, and, also, pay schedules, that the master labor agreement is followed and so, in the course of doing my job, I have to refer constantly to that agreement.

Q. (By Mr. Heimann): Did you see to it, then, that in the performance of the work out at Twenty-Nine Palms, the master labor agreement was followed in the respects that you indicate?

Mr. Nicoson: I object to that on the grounds, obviously, incompetent, irrelevant to any issues be-

(Testimony of William E. Coombs.)

fore you now. I'm willing to concede a twilight zone in which he may inquire with respect to the operation of this company on the jurisdictional company but, I'm certainly not willing to concede that he has a right to inquire into the application of that contract and, [451] thereby, reveal possible unfair labor practices which are not in the charge.

There is no charge here that Ford J. Twaits, Morrison-Knudsen, or any people he has talked about being in a joint venture engaged in any unfair labor practice. Certainly, we are expanding this inquiry to needless extent when we go try to find out what other people have done. It isn't—

Trial Examiner: Just a minute. We needn't have extended discussion. I apprehend the point.

Mr. Heimann: I'm not trying to uncover any unfair labor practices and, if I get, at least, if I get a positive answer, I will not pursue the point any further. I don't think I have to go further.

Trial Examiner: Objection overruled.

* * * * *

The Witness: If I understand the question correctly, the answer would be yes.

Q. (By Mr. Heimann): To make sure that you understand the question correctly, would you indicate what your "yes" indicates?

A. It was my job to see that the master labor agreement was [452] followed insofar as hiring and discharge practices and pay scales were concerned. In discharge of those duties I called on the job quite regularly and examined the records of

(Testimony of William E. Coombs.)

what had been done and discussed the practices and procedures with personnel on the job.

* * * * *

Q. (By Mr. Heimann): Mr. Coombs, do you know whether the Ford J. Twaits Company either by itself or as a part of a partnership or joint venture has been performing any work outside the State of California within the last two or three years?

A. It has been performing such work.

Q. Did it perform such work by itself or as part of a [453] partnership or joint venture?

A. As a part of a joint venture.

Q. Tell us who the other parties to the joint venture were.

A. One other party, Morrison-Knudsen Company, Inc.

Q. Is the same Morrison-Knudsen Company, Inc., the one that participated in the work at Twenty-Nine Palms? A. Yes.

Q. And where was the work performed?

A. At Nellis Airforce Base near Las Vegas, Nevada.

Q. Was there a sponsor in that joint venture?

A. Yes.

Q. Who was the sponsor?

A. Ford J. Twaits Company.

Q. In the course of your duties did you gain knowledge of the amounts involved in the performance of that work, I'm referring to the revenues?

A. Yes.

(Testimony of William E. Coombs.)

Q. Either revenues or costs? A. Yes.

Q. Do you know what the approximate amount was and indicate whether revenue or costs?

Mr. Nicoson: Objection on the grounds irrelevant, immaterial, incompetent. Objected to on the grounds it calls for a conclusion of the witness, objected to on the grounds it calls for hearsay and objected to on the grounds not the [454] best evidence.

Trial Examiner: Overruled.

The Witness: The gross revenues from the joint venture contract at Las Vegas, the Nellis Airforce Base that I referred to, will run when the job is completed between ten and eleven million dollars.

Q. (By Mr. Heimann): Do you know the approximate time when work was begun at the Nellis——

* * * * *

A. Approximately June 1, 1953.

Q. And is there presently an estimate when that work is to be completed?

A. It is substantially complete now.

Q. And will you tell us what the work consisted of or consists of?

A. Within the bounds of security, yes. It is a job that is confidential. However, I can say that it was principally for ordnance storage structures.

Trial Examiner: Was the other party to the contract the [455] government agency?

The Witness: Yes, sir.

Trial Examiner: Which one?

(Testimony of William E. Coombs.)

The Witness: U. S. Engineers, Army Engineers.

Q. (By Mr. Heimann): When you say ordnance storage, does that refer to Army ordnance storage or is that not correct?

A. I take it that it would mean any kind of ammunition that comes under the classification of ordnance. [456]

* * * * *

Cross Examination

Q. (By Mr. Nicoson): Mr. Coombs, I take it that the figures you have mentioned here this morning with respect to these various operations, costs, revenues and so forth are matters of record, you have records of them? A. That is correct.

Q. And that those records are in your office?

A. For the most part, yes. Either there or on the job.

Q. And that your office is here in Los Angeles?

A. Yes.

Q. And, also, I take it that you have not been requested to bring those records here?

A. That is correct.

Mr. Nicoson: I think that is all the cross examination I have.

I now move to strike the entire testimony of this witness on the grounds that the testimony *is* indicated by the witness is hearsay, that his testimony is not of the best evidence as he has indicated by his testimony, that there are records in his possession and control which are capable of being produced which have not been requested, that his testi-

(Testimony of William E. Coombs.)

mony is incompetent, irrelevant and immaterial and highly prejudicial to the respondent unions in this proceeding.

Trial Examiner: Does that complete it?

Mr. Nicoson: That is complete. [462]

Trial Examiner: For the record the objection is overruled—motion to strike is denied. [463]

* * * * *

FRANK E. BOYCE

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Heimann): Mr. Boyce, have you brought with you again the document that has been marked G.C. 3, the document that has been marked G.C. 3 in this case? A. Yes.

Q. Will you tell us if that is a document you have used in 1954 in your capacity as labor relations director of the AGC? A. Yes.

Mr. Nicoson: Objected to as immaterial.

Trial Examiner: Pardon?

Mr. Nicoson: Objected to as immaterial.

Trial Examiner: Overruled. [466]

Mr. Nicoson: Whether he used it or not doesn't prove anything.

Trial Examiner: Overruled.

Q. (By Mr. Heimann): And will you tell us whether you used that document of which G.C. 3 for identification is a copy in your dealings with

(Testimony of Frank E. Boyce.)

employer members or, rather, members of AGC?

Mr. Nicoson: Same objection.

Trial Examiner: Overruled.

The Witness: Yes.

Q. (By Mr. Heimann): Would you tell us whether you used the document of which this is a copy in your dealings with various labor unions in the building and construction field?

Mr. Nicoson: Same objection.

Trial Examiner: Overruled.

The Witness: Yes.

Q. (By Mr. Heimann): When you used this document of which G.C. 3 for identification is a copy, were you under the impression that it constituted the then current contract between the AGC and various building and construction trades unions?

Mr. Nicoson: I object to what his impression was on the grounds it is immaterial, incompetent, and irrelevant.

Trial Examiner: Overruled.

The Witness: Yes. [467]

Q. (By Mr. Heimann): Did you convey that impression to the members of AGC that you were dealing with?

Mr. Nicoson: Same objection.

The Witness: Yes.

Trial Examiner: For the record, the objection is overruled.

* * * * *

(Testimony of Frank E. Boyce.)

Q. (By Mr. Heimann): Did any of the members of AGC ever challenge your impression which you stated you conveyed to them that that document represented the then current contract between the AGC and various building and construction trades unions?

* * * * *

Mr. Nicoson: I object to it on the ground first, it is incompetent and irrelevant and immaterial. Second, it calls [468] for hearsay answer, third, that it is compound; fourth, that it calls for conclusion of the witness; and fifth, it assumes facts not in evidence.

Trial Examiner: What fact not in evidence?

Mr. Nicoson: That he was ever consulted in a challenging manner.

Trial Examiner: Objection overruled.

* * * * *

Q. Maybe you misunderstood my question. I will rephrase it.

Did any member of the AGC to whom you conveyed the impression that that was the then current contract between the AGC and the building and construction trades unions ever claim that this was not the then current contract?

Mr. Nicoson: Same objection.

Trial Examiner: Overruled.

The Witness: No.

Q. (By Mr. Heimann): Did any labor union to whom you [469] conveyed the impression that that was the then current contract between the

(Testimony of Frank E. Boyce.)

AGC and these unions claim that this was not the then current contract between the AGC and these unions?

Mr. Nicoson: I object to that on the same ground, immaterial, incompetent and irrelevant. Also assumes facts not in evidence. I don't believe he testified that he conveyed the impression to any labor unions. I think up to now that he had conveyed his impression that it was a contract to members of AGC but not to members of labor unions or has any question been propounded to this witness which indicates he ever had any request for impression from anybody from the labor unions.

Trial Examiner: I believe the record is complete in that respect. The objection is overruled.

* * * * *

The Witness: No.

Q. (By Mr. Heimann): Did you use the document of which G.C. 3 for identification is a copy in your dealings with the Los Angeles District Council of Carpenters or any of its affiliated local unions? [470]

* * * * *

Trial Examiner: Let's have a specification as to time.

Q. (By Mr. Heimann): My question relates to, let's say, the last half of 1953 and first two months of 1954. * * * * *

The Witness: Well, as far as using that, that covers a whole lot so I don't know how to answer the question.

(Testimony of Frank E. Boyce.)

Q. (By Mr. Heimann): Did you ever cite the contract during that period to any of these unions?

A. If you will ask me if I discussed it or something like that with those people, the answer would be yes, I have.

Q. Now, did any of these unions claim at that time or at those times that this document was not the contract that was then in effect between the AGC and these unions? A. No.

Mr. Nicoson: May I inquire when he says "these unions," he is talking about the Los Angeles District Council of Carpenters or its affiliated unions?

Trial Examiner: Yes.

Mr. Heimann: That's right. [471]

Q. (By Mr. Heimann): Did you during the same period of time discuss this document with the San Bernardino and Riverside Counties Council of Carpenters or any of its affiliated unions?

Trial Examiner: Speaking still of the last half of '53 and first two months of '54.

The Witness: I don't think that I did. [472]

* * * * *

Q. (By Mr. Heimann): Mr. Boyce, did any member of AGC or of BCA or any representative of any building or construction trades union which is listed in G.C. 3 for identification ever advance the contention to you in your capacity as labor relations director of AGC that the document of which G.C. 3 [473] for identification is a copy did not constitute the then current contract between AGC

(Testimony of Frank E. Boyce.)

and various building and construction trades unions, and my question relates to the same time as the previous few questions.

Mr. Nicoson: Object to the question on the grounds incompetent, irrelevant, immaterial, compound, lengthy, unintelligible, calls for a conclusion of the witness, legal conclusion of the witness which this witness has not shown any expert witness from which he may formulate an answer, also calls for hearsay not binding upon the parties in this proceeding.

Trial Examiner: Overruled.

* * * * *

A. May I ask if I know the question? You asked me did anybody ever deny that this was not a part of the official agreement?

Trial Examiner: Did they ever deny or challenge that agreement?

The Witness: No, no.

Q. (By Mr. Heimann): Now, Mr. Boyce, as labor relations director of the AGC, have you had frequent occasion to use the document of which G.C. 3 is a copy and to discuss it with other interested persons during the same period? [474]

* * * * *

The Witness: Yes, I have discussed the agreement with other people. [475]

* * * * *

Q. (By Mr. Heimann): Mr. Boyce, during that period, did you treat the document of which G.C. 3 is a copy as the then current contract between the

(Testimony of Frank E. Boyce.)

AGC and the building and construction trades unions?

Mr. Nicoson: I will have to make the same objection that I have been making to this line of testimony all the way through.

Trial Examiner: Overruled. [476]

* * * * *

The Witness: I would have to answer the question this way, about the word "treat," it was the agreement that was being used at that time.

* * * * *

Voir Dire Examination

Q. (By Mr. Garrett): These questions, Mr. Boyce, are all going to be concerning the looseleaf booklet here that has been marked G.C. 3 on the front page. [477]

* * * * *

Q. It contains, it is a fact, is it not, that it contains no actual signatures, that is, written signatures for reproduction of written signatures?

A. That's right.

Q. Now, at the end of that text beginning on page numbered 1 which begins, "This agreement entered into this 3rd day of June, 1946," we find the end of that on Page 29, do you not?

A. Yes.

Q. Let's see, then, the *way* rate section comes in and wage rates for sub-trades come in. This document that we began to look at on page numbered 1, I can't find that it contains even any printed signatures, can you? A. No. [478]

* * * * *

(Testimony of Frank E. Boyce.)

Q. (By Mr. Garrett): Is it not a fact, Mr. Boyce, that you know of your own knowledge that Pages 1 to 29 of G.C. 3 are not a true copy of any document that ever existed?

Mr. Heimann: Objected to as immaterial within view of the Trial Examiner's ruling and of the facts stated in my prior remarks.

Trial Examiner: Sustained as to voir dire only.

Mr. Garrett: May I offer to prove by this witness that if permitted to answer the question he will testify that pages [494] 1 to 29 of G.C. 3 are not a true copy of the purported agreement of June 3rd, 1946, or a substantial copy of that agreement, either, as originally made or thereafter amended.

Mr. Heimann: I will object to the acceptance of the offer.

Trial Examiner: The offer is rejected as to voir dire only. [495]

* * * * *

Trial Examiner: Well, it was not my impression, whatever Mr. Heimann may have said in his most recent marks, it was not my impression that the offer was made of G.C. 3 as an offer of a copy of the 1946 agreement per se.

Mr. Heimann: Your impression is correct, may I say.

Trial Examiner: It was my impression that G.C. 3 was offered as a document which was identified by the witness as one identical in every re-

(Testimony of Frank E. Boyce.)

spect that he could discover with the document in his office.

Mr. Garrett: In that event, it has utterly no probative value on the question of what's in the 1946 agreement. After all, our fundamental question is what's in the 1946 agreement.

Trial Examiner: I understand that is respondent's [499] contention in this proceeding. Mr. Heimann is at liberty to make a different contention and if he does so, I will be compelled as the trier of fact to accept either his contention or yours.

* * * * *

Q. (By Mr. Garrett): Isn't it a fact that you do not know if Pages 1 to 42 are true copies except of the printed copy that you have in your office?

A. Yes. [504]

* * * * *

Q. Now, will you go to the back of the book and look over [509] all the yellow pages contained there under the heading "Statewide Pipeline Agreement," Page No. 1 to 15, inclusive, followed by a yellow page marked 1. Will you look over those yellow pages? That would be the last 16 pages of the book.

I think you have testified that the AGC prepares this book from time to time from which G.C. 3 is a printed copy?

A. Yes.

Q. And I presume that the AGC which you represent uses the same plan and system in preparing all portions of the book, is that correct?

A. Yes.

(Testimony of Frank E. Boyce.)

Q. Now, referring to the white pages that I asked you to have in mind, have you ever seen the original of the purported agreement of 1946 which has been discussed here?

Mr. Heimann: May I have a standing objection to this line of questioning?

Trial Examiner: You have a standing objection to all portions of voir dire examination which relates to the 1946 agreement or alleged 1946 agreement.

Mr. Heimann: Thank you.

The Witness: Yes.

Q. (By Mr. Garrett): And when was that?

A. Well, in '46, I'm sure.

Q. Was the copy of the document you saw the original copy? A. Yes. [510]

Q. And was it a typewritten document?

A. Mimeographed copy. Typewritten to start with, yes.

Q. And now, with respect to the typewritten copy which you saw, that was the original copy, was it not? A. Yes.

Q. The first copy that was prepared and the one that you considered was the agreement was a document consisting of typewritten pages, right?

A. Right.

Q. And the document that stated at its beginning that it was an agreement made and executed on the 3rd day of June, 1946, correct?

A. I couldn't say.

Q. Well, you recall that it bore somewhere near

(Testimony of Frank E. Boyce.)

its heading—— A. That's right.

Q. ——a typewritten date and that that date was in 1946. You recall that, don't you?

A. Yes.

Q. And you recall that it contained the language that it would be binding upon such members of your association who signed the contract, is that not a fact, it referred to the contractors signatory thereto, didn't it? A. That's right.

Q. And it said that they, and they alone, members would be bound by the agreement were the ones who became signatories? [511]

A. Right.

Q. Isn't it a fact that that document, that typewritten document that you saw in 1946 which was the original agreement of 1946 didn't have any contractor signatures on it? A. Well——

Q. Just answer that question, isn't it a fact that that document, that original document, didn't have *anything* contractor signatures on it?

A. Yes.

Q. You mean by that answer that it didn't have any contractors' signatures on it, I presume, am I correct? A. You are right. [512]

* * * * *

Q. (By Mr. Garrett): Isn't it a fact, Mr. Boyce, that you know that after that typewritten original was typed up and after that typewritten original was completed, that a photostat was made up by which the signatures of certain contractors were represented to be attached to that original agree-

(Testimony of Frank E. Boyce.)

ment of 1946, that those signatures, as a matter of fact, were photostated from the agreement executed in 1942, that is, that the photostats showed an agreement which was typed in 1946 but showed signatures on that agreement that were affixed to a document in 1942.

Will you state whether or not you know that to be a fact?

A. Well, may I say a few words before I answer the question?

Q. You can answer the question first and then explain your answer any way you want.

Trial Examiner: I think so.

The Witness: All right, the answer would be no.

Q. (By Mr. Garrett): Isn't it a fact that you, yourself, heard Mr. Shaw say that that was the way the photostat was made up, that they took the 1946 typewritten sheet and photostated on to it the 1942 signatures?

Mr. Heimann: I object to the question. That assumes facts not in evidence, indefinite as to time and place.

Trial Examiner: Sustained. [513]

* * * * *

Q. (By Mr. Garrett): Well, as a matter of fact, a typewritten agreement prepared in 1946, that document wasn't sent around to various members for their signatures, was it?

A. '46 agreement?

Q. That's right. A. I don't have to say.

Q. The agreement, the writing that was typed,

(Testimony of Frank E. Boyce.)

it was never sent around to any of your members for signature, was it? A. I think it was.

Q. You think it was? A. I think it was.

Q. Do you know? A. No, I don't.

Q. Isn't it a fact that you never saw any of your members or any contractors actually sign that agreement, isn't that a fact?

A. Well, I'd have to say, no, because during that time I must have seen one sign the agreement.

Q. You think you remember seeing some contractor sign on it but you can not remember the name of the contractor or the [514] firm that so signed, right? A. That's right.

Q. But you at that time were Mr. Shaw's assistant, correct?

A. No, I was assistant to Joe Christian at that time.

Q. Did Mr. Christian—well, yes, you were the assistant labor relations manager of AGC?

A. That's right.

Q. And the fact of the matter is, is it not, Mr. Boyce, that no copy of the 1946 original agreement bearing the signatures of any of your contractor members was ever delivered back to the labor unions by the AGC or by anyone else, as far as you know?

Mr. Heimann: Object to that question. Whether a signed copy was delivered to labor unions doesn't even have any bearing of whether the contract was executed. That is my objection in addition to my

(Testimony of Frank E. Boyce.)

standing objection that the whole line is irrelevant.

Trial Examiner: Overruled.

The Witness: What was the question?

Trial Examiner: Will the reporter please read the question?

(The question was read.)

Q. (By Mr. Garrett): Isn't that the fact?

A. Yes. [515]

* * * * *

Mr. Garrett: The respondents object to the admission of G.C. 3 in evidence upon the grounds that it is not the best evidence, that it is hearsay as to these respondents, that it contains no evidence in and of itself of the execution of any document either the original of which it purports to be secondary evidence or any other, that no proper foundation has been laid and that it is incompetent, irrelevant and immaterial.

In that connection I will be very brief. I want to stress four points.

The document which General Counsel is trying to prove is a document which states that it will be binding only, not upon the Associated General Contractors, but only upon such of the Associated General Contractor members who become signatory thereto and the document on its face shows no signatures of any contractor members.

Trial Examiner: You are speaking about G.C. 3, or the purported original?

Mr. Garrett: The purported original as estab-

(Testimony of Frank E. Boyce.)

lished by secondary evidence and the secondary evidence, the undisputed evidence is that there is no signature upon the document binding any employer party, employer parties referred to as contractors. The contract is, by its terms, insofar as we know them, not a contract between the unions [523] as organizations and the Associated General Contractors of an organization, but a contract between the unions on the one side and such contractor members of the Associated General Contractors as has become signatory thereto. All the evidence before us shows that there is no signature of any contractor members. [524]

* * * * *

Now, our other contention we make as to the inadmissibility of G.C. 2 is that the testimony of this witness clearly shows that the G.C. 3 is a copy of a printed document prepared, according to the witness, by the witness' organization according to a scheme and plan which it follows for its own use and the use of its members. There is no testimony either in the record or from this witness that the documents of which G.C. 3 is a representative are ever communicated to any respondents in this case and the Associated General Contractors with which the witness is [525] connected is not a respondent in this case. There is no evidence of any kind charging the respondents in this case with having received or with having knowledge of G.C. 3, or the type of publication of which G.C. 3 is a copy.

(Testimony of Frank E. Boyce.)

In view of the state of the record, the foundation fails upon another point. The foundation fails, first, because it shows on its face affirmatively that the secondary evidence is not secondary evidence of the executed document. It shows on its face that the secondary evidence must be presumed to be a document which has not been executed by any contractor members of the AGC. It fails because it fails to show that ever, at any time, the respondents here have had knowledge of or been bound by or have been parties to the purported agreement which is G.C. 3 and it fails on the fourth point in that the affirmative testimony of this secondary evidence was never delivered. In other words, he has testified that the writing was made. He has testified that "I think it was signed by some contractor, or contractors, I can't remember their names." But, he says, the document when and if so signed was, and this is positive testimony, never delivered to the unions. With that state of the evidence, we claim no proper foundation has been laid.

That is all. * * * * * [526]

Q. (By Mr. Heimann): Mr. Boyce, I show you a document that has been marked G. C. 7 for identification and I will show it to counsel first although he has seen it before.

This document has previously been identified on the record by Mr. Cox, the staff counsel of AGC. Mr. Boyce, I represent to you as I represent to the Trial Examiner and all interested parties that this

(Testimony of Frank E. Boyce.)

document was given to me by Mr. Cox and I will ask you what that is.

A. Without going all through it, I would just have to say it is just exactly as the heading says, an Amendment to AGC and BCA Southern California Master Labor Agreement.

Q. Do you recognize any signatures on that document?

A. Well, I would recognize Mr. Shaw's signature.

Q. Is the name of Spencer Webb on that document? Do you recognize that signature?

A. Yes, I do.

Q. Do you recognize it as the signature of Mr. Webb? A. Yes.

Mr. Heimann: I am not sure if the record contains a stipulation by the respondent unions that the name of J. F. Cambiano thereon is the signature of Mr. Cambiano.

Mr. Nicoson: If it doesn't, we will admit it is Mr. Cambiano's signature. [543]

* * * * *

Mr. Heimann: Thank you for the stipulation.

Q. (By Mr. Heimann): Mr. Boyce, have you brought with you at my request a document entitled 1950 resolution to continue, or words to that effect?

A. That is the document that I believe you requested.

Q. Mr. Boyce, would you tell us what that document is?

A. I believe this is as the heading states, Resolu-

(Testimony of Frank E. Boyce.)

tion to Continue the AGC-AFL Southern California Master Labor Agreement.

Trial Examiner: Do I understand your response to be you believe on the basis of personal knowledge the heading is fully what it indicates?

The Witness: Yes. [545]

Trial Examiner: Very well.

Mr. Heimann: Mr. Examiner, of course, I'm not offering this in evidence right now. However, I would like to state at the present point that I concede that this document does not contain the signatures of the United Brotherhood of Carpenters and Joiners of America or the Los Angeles County District Council of Carpenters, that it is my information and belief that this document was never signed by the United Brotherhood of Carpenters or the Los Angeles District Council of Carpenters, that I attach no independent significance to this document, that at the time I will offer it I will do so merely for the purpose of explaining the settlement agreement which is G. C. 6 for identification which I will offer in evidence and which has reference and, I believe, incorporates by reference, at least, parts of the resolution to continue which is G. C. 16 for identification and that is the purpose for which I will offer it.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 16 for identification.)

Trial Examiner: Very well.

Q. (By Mr. Heimann): Mr. Boyce, you stated

(Testimony of Frank E. Boyce.)

that you attended certain negotiation meetings between the AGC and the unions concerned prior to 1954? A. Yes.

Q. During that time would you tell us whether these meetings [546] were conducted only between AGC and the unions or between AGC and BCA jointly and the unions?

Mr. Nicoson: Objected to on the grounds compound, no foundation having been laid.

Trial Examiner: Overruled.

The Witness: Would you give me the years that you mentioned?

Q. (By Mr. Heimann): All right, how about 1953?

A. Yes, it was a—joint meetings at that time with the BCA and so forth.

Q. How about 1952?

A. Joint meetings with the BCA.

Q. How about 1951? A. Joint meetings.

Q. How about 1950? A. Joint meetings.

Q. I believe there were negotiations in 1948?

A. If you wish me to make a statement, I can make it clear for you that there have been joint meetings since the BCA become a part, been joint meetings.

Q. Since they became a part of what?

A. Became a part of the agreement.

Q. I see. When did the BCA become a part of the agreement? A. That I can't say.

Q. If you remember.

A. I just don't remember the year, I really don't.

(Testimony of Frank E. Boyce.)

Q. You don't remember the year but you know that by 1950 they were a part of the agreement?

A. Yes.

Trial Examiner: Well, I would like to get clear for the record the significance of this phrase "part of the agreement." Am I correct in assuming, Mr. Boyce, when you speak of BCA becoming part of the agreement you speak of a situation in which an organization known as BCA undertook to negotiate agreements with the building and construction trades unions in Southern California, is that what you mean by becoming part of the agreement?

The Witness: Yes, they become part of the existing agreement, that is true.

Q. (By Mr. Heimann): Now, during those years when BCA, as you put it and explained it, was part of the agreement, did the BCA and the AGC have identical or joint agreements with the unions or did they have separate and different agreements with the unions?

A. No, there were joint agreements.

Q. They were joint agreements? A. Yes.

Q. Does that mean that they consisted of one instrument naming both BCA and AGC? [548]

* * * * *

The Witness: Yes.

Q. (By Mr. Heimann): Now, Mr. Boyce, have you brought with you at my request a list of the members of AGC in 1953?

A. Brought the roster of the membership as you requested.

(Testimony of Frank E. Boyce.)

Mr. Heimann: Would the reporter please mark the document G. C. 17? * * * * * [549]

Mr. Heimann: Yes, I would like to offer it in evidence.

Trial Examiner: Very well. I will ask at this time, Mr. Nicoson, if in the light of the record up to this point any objections other than those previously presented are pressed by the respondent unions.

Those objections, for your information, according to my notes made directly from the transcript during the noon recess, are lack of foundation, hearsay as to the respondents, irrelevant and immaterial.

Mr. Nicoson: We stand on the same objection.
* * * * *

Trial Examiner: Whatever the situation may be with respect to the 1946 contract, my ruling with respect to G. C. 3 is not intended, therefore, to indicate that I believe it to be admissible as secondary evidence of the 1946 contract. I believe it to be admissible only as a conformed copy or duplicate original of a document referred to and used as a contract by Mr. Boyce during the period previously stated. Since my ruling is based upon these grounds, I overrule the objections presented on behalf of the respondent unions and receive the document in evidence as indicated.

(The document heretofore marked General Counsel's Exhibit No. 3 for identification was received in evidence.) [573]

GENERAL COUNSEL'S EXHIBIT No. 3

AGC - AFL
SOUTHERN CALIFORNIA
MASTER LABOR AGREEMENT

Administrative Articles

The Associated General Contractors of America
(Cut)

June 1, 1953

* * * * *

Labor Agreement Between Southern California
General Contractors and A. F. of L. Building
and Construction Trades Unions

This Agreement entered into this 3rd day of June, 1946, by and between members of the Associated General Contractors of America who are signatory hereto, parties of the first part, hereinafter referred to as the Contractors, and the Building and Construction Trades Councils of Los Angeles, Long Beach, Riverside, San Bernardino, Orange, San Diego, Imperial, Ventura, Santa Barbara, San Luis Obispo, and Kern, each affiliated with the Building and Construction Trades Department of the American Federation of Labor: International Hod Carriers Building and Common Laborers Union; The Southern California District Council of Laborers; United Brotherhood of Carpenters and Joiners of America; California State Council of Carpenters; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Joint Council of Teamsters, No. 42, ex-

cept for Kern, Inyo and Mono Counties; Teamsters Local Union No. 87 for Kern, Inyo and Mono Counties; International Union of Operating Engineers; Local Union No. 12 of the International Union of Operating Engineers; Operative Plasterers and Cement Finishers International Association; International Association of Bridge, Structural and Ornamental Iron Workers; Bricklayers, Masons and Plasterers' International Union; Brotherhood of Painters, Decorators and Paperhangers; Granite Cutters International Association; International Brotherhood of Blacksmiths, Drop Forgers and Helpers; International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers; International Brotherhood of Electrical Workers; International Union of Elevator Constructors; International Association of Heat and Frost Insulators and Asbestos Workers; International Association of Marble, Stone and Slate Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers and Terrazzo Helpers; Journeymen Stone Cutters Association of North America; Sheet Metal Workers International Association; United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada; United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association; Wood, Wire and Metal Lathers International Union; all affiliated with the American Federation of Labor, who are signatory hereto for themselves, for their various Craft Councils and Local Unions which have jurisdiction over the work in the territory hereinafter described, par-

ties of the second part, hereinafter referred to as the Unions.

* * * * *

I.

Coverage

A. That this Agreement shall apply to and cover all employees of the Contractors employed to perform or performing construction work, as such employees and construction work are respectively more particularly defined hereafter in Article II Section A and Article XV of this Agreement, in the area known as Southern California, more particularly described as the counties of Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, San Diego, Ventura, Santa Barbara, San Luis Obispo and Kern.

* * * * *

II.

Union Recognition

A. That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective bargaining representatives of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such jurisdiction is defined by the Building and Construction Trades Department of the American Federation of Labor as of the date of this Agreement. It is understood that the Unions do not at this time, nor will they during the term of this Agreement, claim jurisdiction over the following classes of employees: executives, civil engineers, and their helpers, superintendents, assistant superintendents, master me-

chanics, time keepers, messenger boys, office workers or any employees of the Contractor above the rank of craft foreman.

That subject to this understanding the Contractor shall have entire freedom of selectivity in hiring and may discharge any employee for any cause which he may deem sufficient, provided there shall be no discrimination on the part of the Contractor against any employee, nor shall any such employee be discharged by reason of any Union activity not interfering with the proper performance of this work.

It is the intention of the parties that all workmen covered hereby shall be or become forthwith upon employment and remain continuously, members in good standing of the International Unions signatory hereto through their affiliated Local Unions having work and area jurisdiction and on whose behalf this Agreement is executed, as a condition of employment, and that this provision shall become operative without further notice or amendment whenever amendments to or judicial interpretations of the Labor Management Relations Act of 1947 remove the inhibitions against the application of this paragraph now existing under the present wording and judicial interpretations of that Act.

It is agreed that all workmen covered hereby shall be or become, not more than thirty (30) days after employment and remain continuously, members in good standing of the International Unions signatory hereto through their affiliated Local Unions having work and area jurisdiction and on

whose behalf this Agreement is executed, and shall remain available for work as a condition of employment.

B. That in the employment of workmen for all work covered by this Agreement in the territory above described, the following provisions, subject to the conditions of Article II-A, above, shall govern:

1. That the Local Unions shall establish and maintain open and non-discriminatory employment lists for employment of workmen in the work and area jurisdiction of each respective Local Union of each particular trade.

That the Contractors shall first call upon the respective Local Unions having work and area jurisdiction, or their Agents, for such men as they may from time to time need, and the respective Local Unions, or their Agents, shall immediately furnish to the Contractors the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the Contractors.

That the respective Local Unions, or their Agents, will furnish each such required competent workman or skilled mechanic entered on their lists, to the Contractors by use of a written referral and will furnish such workmen or skilled mechanics from the respective Local Unions' listings in the following manner:

(a) Workmen who have been recently laid off or terminated in that respective Local Union's work and area jurisdiction by the Contractors now desiring to re-employ the same workmen in that same area provided they are available for employment.

(b) Workmen who have been employed by Contractors in the respective Local Union's work and area jurisdiction within the multiple-employer unit during the previous ten (10) years, and are available for employment.

(c) Workmen whose names are entered on the list of the respective Local Union having work and area jurisdiction and who are available for employment.

That reasonable advance notice (but not less than 24 hours) will be given by the Contractors to the Unions, or their Agents, upon ordering such workmen or mechanics; and in the event that 48 hours after such notice, the Unions or their Agents shall not furnish such workmen, the Contractors may procure workmen from any other source or sources. If men are so employed, the Contractors will immediately report to the Local Unions having work and area jurisdiction, or their Agents, each such workman by name.

That workmen employed by the Contractors for a period of thirty (30) days continuously or accumulatively within the multiple-employer unit and procured in accordance with II, B-1, (c), above or procured from other sources by the Contractors themselves, shall become members of the appropriate craft Union signatory hereto immediately, upon terms and qualifications not more burdensome than those applicable at such times to other applicants to such Union.

2. Contractors may transfer workmen in good standing of the six basic crafts from the jurisdic-

tion of one Local Union to the jurisdiction of another Local Union of the same craft up to the maximum permitted at the date of this Agreement by the International Constitution and By-Laws of the craft involved. In any event they may transfer up to 10 per cent of the current requirements by crafts on the project to which the transfers are to be made, including a maximum of two foremen in each craft. Contractors recognize the desirability of employing workmen in good standing of the Local Union having jurisdiction to the greatest possible extent and it is the intention of the parties that the Local Union having jurisdiction refers to the work jurisdiction and area jurisdiction of all appropriate craft Local Unions affiliated with any Union signatory hereto as such work and area jurisdiction shall continue to be recognized, accepted and maintained.

Workmen employed by any Contractor pursuant to the terms of this Agreement, and remaining in good standing in the craft in which they are employed, shall not be removed nor transferred by the Unions unless the prior approval of the Contractor has been obtained.

C. Whenever reference is made in this Article II to the Agents of the Unions, such reference is intended to designate the representative of the Building and Construction Trades Council or the Local or International craft Union having jurisdiction over the workmen employed or to be employed by the Contractor.

* * * * *

(Discussion off the record.)

Trial Examiner: On the record.

With respect to General Counsel's 7 for identification, the record as the proceedings before Trial Examiner Myers shows that Mr. Cox identified the document as purporting to be an amendment to the Southern California master labor agreement of June 3rd, 1946, between certain parties named in the document. The record indicates that it was offered, that the respondent unions objected on the grounds that there was no proper foundation laid and that the document offered for identification did not relate to any agreement to which any of the respondents are shown to be a party; also, upon the grounds of its irrelevancy, incompetency, and immateriality; the fact that it was hearsay as to the respondents and had no tendency to prove or disprove any issues in this case which I take it another way of saying immateriality.

Trial Examiner Myers indicated he would reserve decision. What is the General Counsel's present intention with respect to the offer in the light of the record as it now stands?

Mr. Heimann: I maintain my offer, Mr. Examiner.

Trial Examiner: In the light of the record as it now stands, what is respondent unions' position with respect to objections? Do you stand on those previously made or wish to add any?

Mr. Nicoson: We stand on those previously made and wish [578] to renew them.

Trial Examiner: Very well. At this time I will

overrule the objections of respondent unions and receive General Counsel's 7 for identification in evidence.

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 7 for identification was received in evidence.) [579]

GENERAL COUNSEL'S EXHIBIT No. 7

1953 AMENDMENT TO THE AGC-BCA-AFL SOUTHERN CALIFORNIA MASTER LA- BOR AGREEMENT

In accordance with the provisions of the AGC-BCA-AFL Southern California Master Labor Agreement, dated June 3, 1946, including the subsequent annual "Resolutions to Continue" the same, and particularly in accordance with the "Settlement Agreement" amendatory thereto, dated November 18, 1950, the parties hereto mutually agree to modify Article XIX of the aforesaid Master Labor Agreement, by increasing the current hourly wage rates of all classifications listed under Carpenters an additional 13c per hour in each of the twelve (12) Southern California Counties, namely: Los Angeles, Orange, Riverside, San Bernardino, Imperial, San Diego, Ventura, Santa Barbara, San Luis Obispo, Kern, Inyo and Mono.

The aforesaid increased hourly wage rates shall apply in each and every of the above-specified Counties for all types of construction work, including but not limited to, highway, heavy, and building

construction work, as such work is more clearly defined in Article XV of the aforementioned Master Labor Agreement.

The aforesaid increased hourly wage rates shall be placed in effect in the above-described area, on all of the above-mentioned types of construction work on June 15, 1953, and shall continue in full force and effect until amended, modified, or terminated, as provided in the appropriate terms of the aforementioned Master Labor Agreement, its "Resolutions to Continue" and/or its "Settlement Agreement."

Signed this 29th day of May, 1953.

Southern California Chapter Associated
General Contractors of America,

/s/ By Spencer Webb, President,

/s/ By W. D. Shaw, Manager

San Diego Chapter Associated Gen-
eral Contractors of America,

/s/ By (Illegible) Golden, President,

/s/ By M. A. Mathias, Manager

United Brotherhood of Carpenters &
Joiners of America,

/s/ By J. F. Cambiano,

General Representative

Building Contractors Association of
California, Inc.

/s/ By Irving C. Jordan, President,

/s/ By Edward M. Sills,

Executive Vice-President

Mr. Nicoson: Respondents will not admit that Mr. J. F. Cambiano was authorized by either of the respondents to sign the proffered document, General Counsel's 8, for identification.

Mr. Heimann: Just one minute, may I have that read back?

(The record was read.)

Mr. Nicoson: We further contend that the mere fact that he apparently signed this is simply a declaration of Mr. Cambiano following a well known and well practiced Board rule that an agent is not the final authority with respect to his authority or that the testimony he may give or indicate has to be authority binding upon the principal.

Further, that the fact that Mr. Cambiano has signed the document is not binding upon the respondent and I think I mentioned that his signature does not constitute proof of that.

Secondly, the document offered, and this probably goes to the probative value of it, but it also seems to go to the relevancy, materiality and competency of the document, does not refer to any documents which have been received or proffered in this proceeding unless, possibly, it may be General Counsel's Exhibit 7 which has been received. Even that is a matter of dangerous reference, or, inference, I should say, which General Counsel seems to be willing to take the risk of.

Third, that it is not a document which shows that any of the matters admitted in evidence here constitutes an agreement [582] binding upon the respondents in these proceedings. It is indefinite and

uncertain as to its mention insofar as respondents are concerned. It is hearsay and is not the best evidence of any action which this letter may purport to reveal.

And fourth, it is not an admission against interests of the respondents in any particular.

Trial Examiner: I'm going to overrule the objections presented on behalf of counsel for the respondent unions and receive General Counsel's 8 for whatever significance it may have as tending to establish, if it does, the existence of certain pre-existing agreements between the parties mentioned therein.

General Counsel's 8 will be received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 8 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 8

[Letterhead of United Brotherhood of Carpenters
and Joiners of America]

17 Aragon Boulevard
San Mateo, California

May 3, 1954

Mr. W. D. Shaw, Manager
Southern California Chapter
Associated General Contractors of America
707 Architects Building
Los Angeles 13, California

Re: A.G.C.-A.F.L. Southern California Master Labor Agreement and Settlement Agreement of
November 30, 1950

Gentlemen:

You are hereby notified, in accordance with Paragraph 8 (b) of the Settlement Agreement between us and, since no agreement has been reached between us on or before May 1, 1954 in response to our demand as heretofore sent to you by letter on February 9, 1954, that on May 18, 1954 any and all of our above contract or contracts with you, including but not limited to the A.G.C.-A.F.L. Master Labor Agreement, and all Resolutions to Continue, with respect to said Master Labor Agreement, and that certain Settlement Agreement of November 30, 1950, shall be and hereby are terminated and at an end, effective as of the expiration of May 18, 1954.

You are hereby further notified that we elect and do so terminate said agreement and contract, or agreements and contracts, and each and all of them heretofore existing between us, in our own behalf, and separately, and as to the United Brotherhood of Carpenters and Joiners of America, and all of its affiliated Local Unions and District Councils in the twelve Southern California Counties, and as to all contractors and employers and their organizations, including the Associated General Contractors of America and the Building Contractors Association of California, Inc., effective as of the expiration of said May 18, 1954.

Very truly yours,

United Brotherhood of Carpenters
and Joiners of America,

/s/ By J. F. Cambiano,

International Representative

For all Carpenters' District Councils and Local
Unions in the Twelve Southern Counties of
California

[Stamped]: Received May 4, 1954.

Mr. Nicoson: Is that the limitation, that is the full extent to which you will receive it?

Trial Examiner: Yes. [583]

* * * * *

FRANK E. BOYCE

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

* * * * *

Q. (By Mr. Heimann): Mr. Boyce, I show you G. C. 15 and point out to you No. 10 of the contractors, the name Morrison-Knudsen Company, Inc., with a signature which I can't read. Now, to the best of your knowledge, did Morrison-Knudsen Company, Inc. ever take steps to cease being a signatory to the master labor agreement since 1946 until, oh, let's say, March, 1954?

A. Not to my recollection.

Q. And I'd like you to look at No. 129.

Trial Examiner: By that you mean signature No. 129?

Q. (By Mr. Heimann): Signature No. 129 which reads Ford J. Twaits Company by Ford J.

(Testimony of Frank E. Boyce.)

Twait's. Now, to the best of your knowledge, did Ford J. Twait's Company ever take any steps between 1946 and March, 1954, to cease being a signatory to the master labor agreement?

Mr. Nicoson: I'm going to object to the form of the question as to whether he took any steps. It seems to me it would be immaterial whether he took steps. The material [603] question is did they during any material time during this period cease to be a member. Take steps might entail were steps successful or unsuccessful.

Mr. Heimann: If they did not take any steps, of course, it would be unnecessary to ask another question but whether they ceased being members, that is asking for a legal conclusion so that is why I phrased the question as I did.

Trial Examiner: Very well, I will permit the question to stand.

Mr. Nicoson: Simply determine what developed. They may have been expelled.

The Witness: Not to my knowledge.

Q. (By Mr. Heimann): To the best of your knowledge, were these two companies signatories of the master labor agreement during the period from November, 1953, to March, 1954?

* * * * *

The Witness: I believe they were.

Mr. Nicoson: Object to what he believes. Move to strike it.

Trial Examiner: Objection overruled. On what is your belief based?

(Testimony of Frank E. Boyce.)

The Witness: My answer to the previous question, I don't know of a time they were out of the agency. [604]

Q. (By Mr. Heimann): During the normal course of affairs, Mr. Boyce, if any signatory to the master labor agreement ceased to become, to be signatory between 1946 and March, 1954, would that come to your attention?

Mr. Nicoson: May I have that read, please?

(The question was read.)

Mr. Nicoson: Maybe it's clear enough.

Trial Examiner: Pardon?

Mr. Nicoson: Maybe it's clear. It isn't clear to me, I don't know what he's talking about.

The Witness: Well, may I state the question as I understood it? I think you asked the question if one of the members of the AGC ceased to become a member, would it come to my attention.

Q. (By Mr. Heimann): Ceased to be a signatory to the contract. A. Yes, yes.

Q. Well, as a matter of information, I will ask the additional question, was it a practice during the 1946 to March, 1953, that a member who was a signatory to the 1946 agreement or who had subsequently signed was a signatory of the labor agreement at any time following his signature until March, 1953?

Mr. Nicoson: I object to that on the grounds it assumes facts not in evidence that there was a contract in 1946 or '47 [605] which was signed by

(Testimony of Frank E. Boyce.)

anybody. You haven't got any evidence to that effect here.

Trial Examiner: The objection is overruled but I find the question a little bit unclear.

Mr. Heimann: I did not frame it as well as I tried to.

Q. (By Mr. Heimann): Mr. Boyce, in your capacity as an official of AGC, did you regard a member who had signed the master labor agreement in 1946 or at any time thereafter as a signatory to the agreement after such time of his signature and until March, 1953?

Mr. Nicoson: Objected to on the grounds it's immaterial what he regarded; second, assumes facts not in evidence there was a contract in 1946; third, it assumes a further fact in evidence that there was a contract which was signed.

Trial Examiner: Without basically ruling on all the grounds stated, I will sustain the objection to the form of the question.

Q. (By Trial Examiner): Mr. Boyce, does AGC have any internal regulation or by-law dealing with the question of, or did it have prior to December 15, 1953, an internal regulation or by-law dealing with the obligation of members bound by a contract to remain bound or dealing with the manner in which they could relieve themselves of obligation under a contract?

A. I would have to answer that question as told to me by our attorney because it is a legal question.

Q. The question is whether you are aware or

(Testimony of Frank E. Boyce.)

became aware in the course of your normal duties of the existence of some sort of by-law or internal regulation or arrangement. I'm not asking what it was, I'm asking if you had become aware of one such regulation.

A. Can I put it my way?

Q. Surely.

A. I think, to explain the question, a member in the Association, he pays his dues for a year. The agreement has always been considered between the unions and the contractor members who are willing to affix their signatures to the agreement, it was our understanding through our legal advice that he was still bound by the agreement to the end of the year or until the new agreement was negotiated. Does that answer it?

* * * * *

Q. (By Trial Examiner): During this period from 1946 until December 15, 1953, have there been any cases that have come to your attention as labor relations director of contractor members of AGC signatories of a labor agreement who took any action which they claimed to be action relieving them of any obligation under the contract? In other words, did any [607] contractor member of AGC ever advise you as labor relations director of the fact that he wished to be relieved of obligations under the contract or considered himself relieved of obligations under the contract? A. No.

Trial Examiner: Very well.

Q. (By Mr. Heimann): Mr. Boyce, you stated

(Testimony of Frank E. Boyce.)

it was your understanding that a signatory was bound until the end of the year or until the new agreement was negotiated? A. Yes.

Q. Now, what happened at the end of the year, what was it your understanding that he ceased to be bound or what was your understanding?

A. Well, no, the new agreement is negotiated and it is brought—May I say this off the record?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

What the—let the record show that during the period of discussion off the record, counsel for the General Counsel and the Trial Examiner explored for the convenience of Mr. Boyce the significance of his response with respect to the obligation of a contractor member to remain bound to a contract previously signed by such contractor member.

It is my impression on the basis of our discussion off [608] the record that Mr. Boyce is now able to give a further explanation of his answer which already stands upon the record. For that purpose, will you redirect your question to Mr. Boyce at this time, Mr. Heimann.

Q. (By Mr. Heimann): Mr. Boyce, if a member has signed the contract during one year, was it your understanding that he ceased to be bound at the end of the calendar year? A. No.

Mr. Nicoson: Your Honor, I'm sorry. Mr. Heimann places the question, a compound question in disjunctive. The witness says no. Which is he say-

(Testimony of Frank E. Boyce.)

ing no to, the first part or the second part or all of it? He says is this so or is that so and the witness says "No." Now, what is he answering?

Mr. Heimann: Let me put it this way, I asked Mr. Boyce, was it your impression that these circumstances a member ceased to be bound. Mr. Boyce answered no. I took the answer to mean that it was not his impression that a member ceased to be bound. Was that the import of your answer, Mr. Boyce?

The Witness: That is right.

Q. (By Mr. Heimann): Now, you also stated that it was your understanding that a signatory was bound until a new agreement was negotiated. Does that mean that it was your understanding that a signatory ceased to be bound when a new resolution to continue was negotiated?

A. I don't think I should answer these questions because our [609] own attorneys have different opinions.

Q. Well, let me ask you this way, there was a regulation to continue in 1950 which is in evidence as G. C. 16, isn't that right? A. Yes.

Q. And there were resolutions to continue in various other years? A. Yes.

Q. Now, when new resolutions to continue were assigned, did the signatories to the contract sign the contract again? Any signatories? A. Yes.

Q. And by signatories, I'm referring to the contractor members of AGC. A. Yes. [610]

* * * * *

(Testimony of Frank E. Boyce.)

Q. (By Mr. Heimann): Now, I call your attention to the name and signature after the figure 11 of the contract, or signatories to the document contained in G. C. 15 that reads—or will you read it to us what that says?

Mr. Nicoson: The document will speak for itself.

The Witness: Macco Construction Company by John McCloud.

Trial Examiner: Objection overruled. The record may stand.

Q. (By Mr. Heimann): Are you familiar with the Macco Corporation?

A. I'd have to ask you what you mean by "familiar"?

Q. Do you know of the existence of the Macco Corporation? A. Yes.

Q. Do you know whether the Macco Corporation is a member of the AGC, I'm not asking whether a signatory, I'm asking whether it was a member of AGC? A. Yes. [612]

* * * * *

Q. (By Mr. Heimann): On the basis of your own personal knowledge acquired as the—strike that, please.

Have you had any dealings with the Macco Corporation during three years preceding March, 1954, or three or four years, something like that?

* * * * *

The Witness: I'd say yes.

Q. (By Mr. Heimann): Did you have such

(Testimony of Frank E. Boyce.)

dealings in your capacity as labor relations director of AGC? A. Yes. [614]

* * * * *

Q. (By Mr. Heimann): In these dealings with the Macco Corporation, in your official capacity during the period of three or four years prior to March, 1954, did you discuss the then current labor agreements with the officials of Macco Corporation with whom you dealt?

* * * * *

The Witness: Yes. [615]

* * * * *

Q. (By Trial Examiner): In your dealings with representatives of Macco Corporation as the AGC labor relations director, did you have occasion to refer to any document which purported to reflect a then current labor agreement? A. Yes.

Q. Did you have occasion to advise the representatives of Macco Corporation as to what your reference to that document showed as to the provisions of the then current labor agreement?

A. Yes.

Q. You told them what you were looking at?

A. Yes.

Q. And what the contents of it were?

A. I agreed from the agreement.

Q. As you recall the occasions on which these conferences occurred, what was the purpose of advising the representatives of Macco Corporation with respect to the contents of the then current labor agreement?

(Testimony of Frank E. Boyce.)

A. Well, I don't remember the instances.

Q. Well, specifically, did you ever advise the representatives of Macco Corporation as to the contents of the then current labor agreement in order to advise them of any obligations they might have toward their employees? A. Yes.

Trial Examiner: I have nothing further. [617]

Q. (By Mr. Heimann): Did such representatives of Macco Corporation ever indicate to you that they were not bound by the then current labor agreement?

* * * * *

The Witness: No. [618]

* * * * *

EDWARD M. SILLS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Heimann): Will you state your full name, please? A. Edward M. Sills.

Q. And what is your address?

A. 1571 Beverly Boulevard, Los Angeles.

Q. Your position, sir?

A. Executive vice president of the Building Contractors Association of California.

Q. Do you have any other capacity in the BCA?

A. No.

Q. How long have you had that position?

(Testimony of Edward M. Sills.)

A. Fifteen years.

Q. And would you tell us in brief what your functions are in that position?

A. The dominant one is labor relations. Next in line, legislative work, public relations and so on.

Q. And has that been your function for the last 15 years?

A. No, it has not. It has been for the last 12 years, the labor relations portion for the last 12 years and the other [639] portion has been the 15 years.

Q. Now, in your official capacities do you take part in the negotiation of any contracts which the BCA or its members concluded?

A. Yes, I'm a member of the negotiating committee and have been for the last 12 years.

Q. Have you taken part in all the negotiations that have taken place during the last 12 years?

A. I have.

Q. Do you know whether the BCA or its members concluded a bargaining, or, let's say, a labor agreement in 1946 with various building and construction trades unions?

A. Yes, with the six basic trades.

Q. Have you received a subpoena to bring in that labor agreement? A. I have.

Q. Have you found the original of that labor agreement? A. I have not.

Q. Have you searched your office?

A. We have, yes, sir.

Q. You have not found it? A. No, sir.

(Testimony of Edward M. Sills.)

Q. Have you, in answer to my subpoena, furnished me with a copy of that agreement?

A. What we considered to be the original copy. Although it [640] doesn't contain the signatures, it does contain the original signatures of those members who are eligible to sign on the agreement. [641]

* * * * *

Q. (By Mr. Heimann): Mr. Sills, I show you a document that has just been marked G. C. 18 for identification and ask you to have a look at it. Is that the document of which you have spoken in your last two answers and which has been made available to me by your office? A. It is, yes.

* * * * *

Q. (By Mr. Heimann): You stated that—rather than for me to repeat what you stated, will you tell us again what that document is?

A. It is what we consider the master copy of the 1946 [642] agreement of the labor agreement negotiated with the six basic trades in 1946.

* * * * *

Q. (By Mr. Heimann): Has any document of which G. C. 18 for identification is a copy ever been signed by any official of the BCA?

* * * * *

The Witness: Yes. If I may say, Mr. Examiner, that the wording in these mimeographed sheets are the basis of all future resolutions to continue and the labor relations in the 12 counties in Southern California whether the document is the

(Testimony of Edward M. Sills.)

actual signed document or not, all labor relations are based on the words in this document. [643]

* * * * *

Q. (By Mr. Heimann): Do you have any personal knowledge who the officials were who signed any document of which G. C. 18 for identification is a copy?

A. Do you mean of the Association or of the unions?

Q. Of the BCA right now.

A. I was one of the signatories myself and the president at that time, I don't recollect. I have forgotten now. I do not recollect his name, I would have to look it up to find out who was president at that time.

Q. All right. Do you know whether or not the president of BCA signed that document?

A. Yes, he did.

Trial Examiner: Do I infer from inspecting the document, [644] then, that this individual whoever he was signed as president and you signed as secretary?

The Witness: Yes, I signed as secretary, yes, sir. At that time I was secretary as well as executive vice president.

Q. (By Mr. Heimann): Do you know if the same document was signed by any representative of the Los Angeles Building and Construction Trades Council?

A. Not this particular document.

(Testimony of Edward M. Sills.)

Q. I'm not talking of G. C. 18 for identification. I'm talking of the document of which G. C. 18 for identification is a copy.

A. Yes, they did, they did.

Q. Do you have any recollection who the person was or the persons were who signed on behalf of that organization?

A. The Building and Construction Trades Council?

Q. That's right.

A. Mr. Mashburn, Lloyd Mashburn.

Q. Do you know what Mr. Mashburn's position was at that time?

A. I think he was secretary of the Los Angeles Building and Construction Trades Council.

Q. Do you know whether that same document of which G. C. 18 for identification is a copy was signed by any representative of the United Brotherhood of Carpenters and Joiners of America?

A. Yes, it was.

Q. Do you know who the person was who signed that? [645] A. Cambiano, Joe Cambiano.

Q. Do you know what Mr. Cambiano's position was at that time?

A. I can only identify him by the way I know him as International representative of the Brotherhood of Carpenters. * * * * *

Q. Does the BCA issue any booklets purporting to contain the contract current at the time of the issuance? A. Yes, we do.

(Testimony of Edward M. Sills.)

Mr. Nicoson: May I inquire, does he mean the issuance of this original or something else?

Mr. Heimann: No, I mean the issuance of the booklet. Is that how you understood the question, that the BCA issues booklets purporting to contain the agreement in effect at the time of the issuance of the booklet?

The Witness: Yes.

Trial Examiner: Very well. [646]

Mr. Heimann: Would the reporter please mark this G. C. 19 for identification?

* * * * *

Q. (By Mr. Heimann): I show you a document that has just been identified as G. C. 19 and ask you if that is such a booklet of which we have just spoken.

A. No, it wouldn't be the same booklet as we put out in the 1946 agreement.

Q. No, I understand that. I'm asking you if that is a booklet that was put out by the BCA purporting to contain the contract current in 1953, at the end of 1953.

A. It is the 1953-54 agreement.

Q. Thank you. Now, I ask you to take a look at that and ask you if that refreshes your recollection, if it can, as to what date was filled in on the document of which G. C. 18 is a copy. If I may help you, would you look at the first page of the booklet?

A. It says the 3rd day of June, 1946, so that must be the date it would have been filled in here or

(Testimony of Edward M. Sills.)

was filled in on the original which is now lost or——

Q. I see. And would you tell us from what you conclude that?

A. Well, that is the date on which we reached the agreement.

Q. I see. A. Of 1946. [647]

* * * * *

Mr. Heimann: At this time, I offer G. C. 18 for identification in evidence. [648]

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 18 for identification was received in evidence.)

* * * * *

Direct Examination—(Continued)

Q. (By Mr. Heimann): Mr. Sills, do you know whether G. C. 18 was negotiated between the BCA and the unions listed thereon or between the BCA and another organization, another [652] employer association, jointly with the unions listed thereon?

* * * * *

The Witness: It was negotiated jointly but by mutual agreement the names of the joint two associations who negotiated the agreement at that time, the names of those associations appeared in there, each in their respective agreements.

Q. (By Mr. Heimann): You mean only——

A. In the case of Building Contractors Association of California, only the name of the Building Contractors Association appeared in our, what we

(Testimony of Edward M. Sills.)

considered, our agreement. And in the case of the Associated General Contractors only the name of the Associated General Contractors appeared in the agreement.

Q. I take it from your answer, and correct me if I'm wrong, that the Associated General Contractors, sometimes referred to as AGC, was the association with whom these joint negotiations were conducted? A. That's right, that's right.

Mr. Nicoson: May I ask one question here? It's probably a cross examination question but it looks like this is a good place to break it down.

Trial Examiner: I will permit the question. [653]

Mr. Nicoson: Then, would it be true in answering the question that you said, Mr. Sills, agreements negotiated jointly by BCA and AGC were identical in all respects except as to the contracting party, that is, I mean the physical documents?

The Witness: That's right.

* * * * *

Q. (By Mr. Heimann): Mr. Sills, were there ever any documents executed subsequent to 1946?

A. Yes.

Q. Which continued the 1946 contract in effect?

A. Yes, sir, there was.

Q. Will you tell us what these documents were commonly called? A. Resolution to continue.

Q. Do you know how often such resolutions to continue were executed?

A. 1947 through 19—up until 1950 with six basic trades; in 1950 with five basic trades.

(Testimony of Edward M. Sills.)

Q. All right. Was any other document executed in 1950 which continued the 1946 agreement in effect either in whole or in part?

A. Yes. In November, 1950—I have to—settlement agreement was reached. I should remember that. [654]

* * * * *

Q. (By Mr. Heimann): I show you a document which has been marked G. C. 20 for identification and ask you if that is the document that you just spoke of.

A. That is the document, yes, sir.

Q. I ask you to look at the name, Marshall Tildon, on Page 7 and ask you if you recognize that as the signature of Mr. Tildon.

A. Yes, it is.

Q. What was Mr. Tildon's position at that time?

A. At that time president of the Building Contractors Association of California.

Q. I call your attention to the name Edward M. Sills on Page 7 and ask you if that is your signature.

A. That is my signature, yes.

Q. I ask you to look at the name of L. A. Mashburn on Page 7 and ask you if you saw Mr. Mashburn affix his signature to that document, if you remember.

A. I don't remember whether I saw it.

Q. Do you recognize that as the signature of Mr. Mashburn?

A. Yes, I believe it is.

Mr. Nicoson: We stipulate it is. [655]

Mr. Heimann: Thank you, Mr. Nicoson.

Trial Examiner: The stipulation is noted for the record.

(Testimony of Edward M. Sills.)

Q. (By Mr. Heimann): I ask you to look at the signature, or at the name of J. F. Cambiano and ask you if you saw Mr. J. F. Cambiano affix his signature——

Mr. Nicoson: We stipulate that is his signature.

The Witness: I don't remember.

Trial Examiner: Do you join in the stipulation?

Mr. Heimann: I accept Mr. Nicoson's stipulation.

Trial Examiner: Very well, the stipulation is noted for the record.

Mr. Heimann: I now offer G. C. 20 for identification for the same purpose for which I offered G. C. 6. [656]

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 20 for identification was received in evidence.)

* * * * *

Q. (By Mr. Heimann): Mr. Sills, you have previously referred to the 1950 resolution to continue and I show you a document that has just been marked G. C. 21 for identification and ask you if that is that document. A. Yes, sir, it is.

Mr. Heimann: Mr. Nicoson, will you stipulate that the document is signed by the same Marshall Tildon, the same Edward M. Sills and the same Lloyd A. Mashburn as previously mentioned?

Mr. Nicoson: Oh, yes.

Trial Examiner: Very well, the stipulation is noted for the record.

(Testimony of Edward M. Sills.)

Mr. Heimann: I offer G. C. 21 in evidence, Mr. Examiner, for the same purpose for which I offered G. C. 16 in evidence, G. C. 16 being the 1950 resolution to continue the AGC agreement. [657]

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 21 for identification was received in evidence.)

Q. (By Mr. Heimann): Mr. Sills, was not the document executed in 1953 between the BCA and representatives of the Building and Construction Trades Unions or any Building and Construction Trades Unions which had reference to the 1946 contract? [659] A. Yes.

* * * * *

Q. (By Mr. Heimann): I show you a document that has previously been admitted as G. C. 7 and I ask you if that is the 1953 document of which we just talked? A. It is.

Q. Mr. Sills, in regard to the contract of 1946 which is G. C. 18, you stated and, correct me if I'm wrong, that the signatures appearing on Pages 17, 18 and 19 were affixed by the members of the BCA in accordance with the requirement of BCA before that procedure was changed, is that correct?

A. Yes, that is correct.

Q. Would you tell us in which way the procedure was changed?

A. After the last signature on that document was put on it, we changed it to assigning a card, a postage free returnable card which we had our

(Testimony of Edward M. Sills.)

membership, we sent out to our membership eligible to sign the agreement, had them sign the card and return it to the Association office thereby affixing their signature on the agreement by that method.

Mr. Heimann: I ask that this be marked G. C. 22 for identification. [660]

* * * * *

Q. (By Mr. Heimann): I show you a document that has just been marked G. C. 22 for identification and ask you if that is such a card. A. It is.

Q. Have any of the members of BCA executed such cards since 1946? A. Yes, they have.

Mr. Heimann: I offer G. C. 22 for identification in evidence.

Trial Examiner: Any objection?

Mr. Nicoson: May I ask just one question?

When these cards are signed, Mr. Sills, do you know, do you give any notification to the Building Trades Council?

The Witness: Yes, we do.

Mr. Nicoson: Upon receipt of the signature, you advise the Council?

The Witness: Yes, we do.

Mr. Nicoson: All right, no objection.

Trial Examiner: Very well, G. C. 22 will be received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 22 for identification was received in evidence.)

(Testimony of Edward M. Sills.)

The Witness: As a matter of fact we furnish these cards the business agents of all the trades. If they run across a member who has not signed, they hand them one of [661] these cards for their signature.

* * * * *

Q. (By Mr. Heimann): Mr. Sills, on the basis of such cards as G. C. 22, when they are filled out and on the basis of the signatures contained on G. C. 18 which is the 1946 contract, does your office compile a current list of signatories?

A. We do, yes.

* * * * *

Q. (By Mr. Heimann): Is that list compiled by you or by employees under your supervision?

A. By employees under my supervision.

* * * * *

Q. (By Mr. Heimann): I show you a document that has just been marked G. C. 23 for identification and ask you if that is such a list? [662]

A. It is.

* * * * *

Q. I withdraw the question. The list, as headed by the words "The following is a list of BCA contractors who are signed to the master labor agreement as of July 23, 1954"?

A. Yes, they were all signatories at that time. We had, this list was copied from those cards, when they signed them. It's made up from those cards, I should say.

Q. All right. Now, do you know whether that

(Testimony of Edward M. Sills.)

list contains the names of any firms or individuals who were not signatories as of the 1st of December, 1953?

A. As of the 1st of December, 1953, yes, it would contain some. [663]

* * * * *

Q. (By Mr. Heimann): When you say "some," what do you mean by that?

A. Well, we are signing people constantly to the agreement so it contains some that had been signed since December 1, 1953.

Trial Examiner: That is between December 1, 1953, and July 23, '54?

The Witness: That's right, new signatures between those dates.

Q. (By Mr. Heimann): I see. Now, do you obtain any knowledge when a member signs one of these cards of which G. C. 22 is a copy?

A. Yes, the cards were put on my desk if they come in by mail and if the man signs it physically in the office, it is also put on my desk before it is returned for processing, putting on this list.

Q. Would you tell us approximately how many members listed on G. C. 23 for identification signed such cards as G. C. 22 between the 1st of December, 1953, and July 23, 1954, or, if you can't answer it that way, about the percentage of the members listed on G. C. 23 for identification who signed between those dates?

A. I cannot tell you the exact number. I can

(Testimony of Edward M. Sills.)

only estimate the number. I would guess between 15 and 20, possibly. [664]

Q. To make it clear, is it your testimony, then, as of the 1st of December, 1953, all but approximately 15 or 20 of the members listed on G. C. 23 for identification had signed cards like G. C. 22, or the 1946 contract which is the copy of the contract which is G. C. 18? * * * * *

The Witness: Are you indicating that those who were signed as of December 1, 1953, were the ones that were signed in 1946, is that your question?

Q. (By Mr. Heimann): No, that all of the members listed on G. C. 23 for identification with the exception of some 15 or 20, approximately, had either signed the cards that is G. C. 22 or had signed G. C. 18? A. Yes, that is correct. [665]

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 23 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 23

The following is a list of the B.C.A. contractors who are signed to the Master Labor Agreement as of July 23, 1954:

* * * * *

Oltmans Constr. Co., 1560 W. Monterey Pass Rd., Monterey Park, Calif.

* * * * *

Pardee Constr. Co., 10639 Santa Monica, Los Angeles 25, Calif. * * * * *

(Testimony of Edward M. Sills.)

Q. (By Mr. Heimann): Mr. Sills, I now show you a document which has been previously marked G. C. 19 for identification and I ask you to tell us what that is.

* * * * *

Q. (By Mr. Heimann): Would you tell us what this is?

A. This is the agreement reached in 1953.

* * * * *

Q. (By Mr. Heimann): When you say "agreement reached in 1953," what do you mean by "reached"?

A. Negotiated with the six basic trades and the associations [673] involved. [674] * * * * *

Q. (By Mr. Heimann): Mr. Sills, are any pages in these booklets of which G.C. 19 is one, G.C. 19 for identification is one, ever replaced?

* * * * *

The Witness: If you say from the 1946 agreement, yes, there were some of them changed and were replaced containing a new hiring clause. [681]

* * * * *

Q. (By Mr. Heimann): For your information, Mr. Sills, I'm not only referring to the white pages in——

A. Referring to the wage scale——

Q. ——not only referring to the white pages or the pages under the tab "administrative articles" but to the booklet, to the pages contained in any place in the booklet.

(Testimony of Edward M. Sills.)

A. Yes, the wage scale is changed from year to year.

Q. And were any new pages inserted on that occasion in these booklets?

* * * * *

The Witness: The agreement is printed separate, a new agreement printed each year, the insertion and new copy is made up each year from the signed document except for certain changes that have been made and I don't remember exactly [683] what those changes were. [684]

* * * * *

Q. (By Mr. Heimann): Mr. Sills, after the signing of the 1953 amendment, did you have any booklets made up in the form in which G.C. 19 for identification is? [688]

* * * * *

The Witness: Yes, we had new booklets made up like this.

Trial Examiner: Let the record show when the witness said "like this," he indicated General Counsel's 19 for identification.

Q. (By Mr. Heimann): And would you tell us how this booklet was assembled and what was incorporated in it?

* * * * *

The Witness: The various amendments that occurred since 1946 which includes the change in the hiring clause, the wage scales, and so on were changed and printed accordingly and the resolution to continue.

(Testimony of Edward M. Sills.)

Trial Examiner: And after they were printed what happened?

The Witness: Then they were assembled in this binder and distributed to our signatory members of the Association.

Trial Examiner: Very well.

Q. (By Mr. Heimann): You said the amendments were incorporated therein. Were they incorporated as separate instruments or were they incorporated in such form as to change the 1946 contract in accordance with those amendments? [689]

* * * * *

The Witness: Only that section of the 1946 agreement which contained the hiring clause was changed. The other amendments were covered by the resolution to continue and the wage scale was changed, also.

Q. (By Mr. Heimann): I see.

Mr. Heimann: I believe the record is clear in that regard. Therefore, I offer G.C. 19 for identification in evidence now. [690]

* * * * *

Q. (By Trial Examiner): You stated in your last response, I believe, Mr. Sills, that upon the assembly of these booklets of which General Counsel's 19 is assembled, they were distributed to signatory members of BCA. Am I correct in my understanding that by that answer you meant that they were distributed to those members of BCA who in one form or another had indicated their assent to some master labor agreement? [691]

* * * * *

(Testimony of Edward M. Sills.)

The Witness: They were sent to the signatory members of the BCA.

Q. (By Trial Examiner): What do you mean by signatory members?

A. Those which signed what we call the master labor agreement.

Q. Did you as the executive vice president of BCA in 1953 retain a copy or copies for your own use? A. Of this document?

Q. Yes. A. Yes.

Q. Have you had occasion since the document was assembled and since copies were distributed to the members of BCA as previously indicated, had occasion to refer and otherwise use the copies of G. C. 19 in your possession?

A. Many times, yes, sir.

Q. In what way have you used them, describe the manner in which you have referred to them and used them and the purposes for which you did so?

A. Well, the agreement provides that in cases of dispute that the dispute shall be referred to a joint conference board if it can not be settled on the job. [692]

* * * * *

The Witness: At the joint conference board meetings, the section involved in the dispute is always read and interpretation or clarification of the wordage as used before a decision is given by the joint conference board. I'm a member and have been a member of the joint conference board.

(Testimony of Edward M. Sills.)

Q. (By Trial Examiner): When you speak of a joint conference board, are you referring to the organization described and discussed in Section 14 of General Counsel's 19?

* * * * *

The Witness: Yes, I am referring to that except that it it also referred to under settlement of grievances and disputes.

Mr. Heimann: That, Mr. Examiner, is Section 5.

The Witness: Section 5 shows the procedure of settlement of grievances and disputes.

Trial Examiner: Very well.

Q. (By Trial Examiner): Aside from your participation in joint conference board proceeding, have you had any occasions since the preparation of G. C. 19 to refer to it and use it in [693] any fashion? * * * * *

The Witness: When a dispute arises or an interpretation is necessary of the agreement, I always refer to it to refresh my memory as to what the agreement actually says.

Q. (By Trial Examiner): Have you ever had occasion to do so in the presence of the representatives of the contractor members of BCA?

* * * * *

The Witness: Yes, the answer is yes, we have had occasion to use it in the presence of contractors. [694]

* * * * *

Q. (By Trial Examiner): Would you describe

(Testimony of Edward M. Sills.)

the circumstances if you recall them in any specific case or class of cases?

* * * * *

The Witness: You mean in the presence of the contractors?

Q. (By Trial Examiner): Yes, describe the circumstances under which you have used it in the presence of the contractors.

A. Well, the thing that comes to my mind right at the moment is we have what they call a labor relations school for three straight months two hours a week at which time the agreement was gone through paragraph by paragraph, interpreted and explanations made of the agreement at which at each class there was over 150 contractors present, signatory contractors and those eligible to sign.

* * * * *

Q. (By Trial Examiner): Independently of its use by you in connection with joint conference board proceedings, have you ever had occasion to use the document of which G. C. 19 is a sample in conferences or meetings or discussions with representatives of any of the building and construction [695] trades unions in Southern California area?

* * * * *

The Witness: Yes, we have had occasions to use it in the presence of representatives of the labor unions involved.

* * * * *

Q. (By Trial Examiner): Can you recall using it in a specific occasion or occasions? * * * * *

(Testimony of Edward M. Sills.)

The Witness: Well, there are innumerable cases we use it in, particularly, in cases of disputes where we read certain paragraphs from the agreement over the telephone to a union representative or if he is in the joint conference board, or read certain paragraphs for clarification to them or they read it to us, depending on what interpretation they are taking and what interpretation we are taking. [696]

* * * * *

Q. (By Trial Examiner): Can you recall any occasions or occasion in which discussions of the type you have just described of the type which occurred involving a representative of the International Brotherhood of Carpenters and Joiners of America in Los Angeles County District Council of Carpenters or Local 1400 of that organization?

* * * * *

The Witness: At one of the last meetings of the joint conference board, the Los Angeles District Council of Carpenters had a case before the joint conference board. Certain portions of the agreement were read for the basis of establishing a clarification and interpretation. Representatives of the Los Angeles District Council of Carpenters were present.

Q. (By Trial Examiner): Do you recall the time or approximate time when this meeting was held?

A. I believe it was in April of this year.

Q. Do you recall the place?

(Testimony of Edward M. Sills.)

A. It was in the BCA office building, our board of directors' room.

Q. Can you identify the persons present so far as your recollection may go?

A. There were representatives from each of the six basic trades including the carpenters as well as representatives from the associations, the AGC and BCA.

Q. Can you identify any representatives of BCA present in [698] addition to yourself?

A. I was present as a member of the conference board and Leo Volk from BCA, a member of the conference board; William Irish who was chairman of the contractors joint negotiating committee on the contractors side; John Cunard, chairman for labor of the joint conference board; Leo Vie, secretary of the Building and Construction Trades Council; Ralph Bronson of the Operating Engineers; Lloyd Leibey of the Labor Unions; Earl Thomas of the District Council of Carpenters, Los Angeles District Council of Carpenters. That is all I recall. [699]

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 19 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 19

BCA - AFL

MASTER LABOR AGREEMENT

Labor Agreement Between Southern California
General Contractors and A. F. of L. Building
and Construction Trades Unions

This Agreement entered into this 3rd day of June, 1946, by and between members of the Building Contractors Association of California, Inc. who are signatory hereto, parties of the first part, hereinafter referred to as the Contractors, and the Building and Construction Trades Councils of Los Angeles, Long Beach, Riverside, San Bernardino, Orange, San Diego, Imperial, Ventura, Santa Barbara, San Luis Obispo, and Kern, each affiliated with the Building and Construction Trades Department of the American Federation of Labor: International Hod Carriers Building and Common Laborers Union; The Southern California District Council of Laborers; United Brotherhood of Carpenters and Joiners of America; California State Council of Carpenters; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Joint Council of Teamsters, No. 42, except for Kern, Inyo and Mono Counties; Teamsters Local Union No. 87 for Kern, Inyo and Mono Counties; International Union of Operating Engineers; Local Union No. 12 of the International Union of Operating Engineers; Operative Plasterers and Cement Finishers International Associa-

tion; International Association of Bridge, Structural and Ornamental Iron Workers; Bricklayers, Masons and Plasterers' International Union; Brotherhood of Painters, Decorators and Paperhangers; Granite Cutters International Association; International Brotherhood of Blacksmiths, Drop Forgers and Helpers; International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers; International Brotherhood of Electrical Workers; International Union of Elevator Constructors; International Association of Heat and Frost Insulators and Asbestos Workers; International Association of Marble, Stone and Slate Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers and Terrazzo Helpers; Journeymen Stone Cutters Association of North America; Sheet Metal Workers International Association; United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada; United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association; Wood, Wire and Metal Lathers International Union; all affiliated with the American Federation of Labor, who are signatory hereto for themselves, for their various Craft Councils and Local Unions which have jurisdiction over the work in the territory hereinafter described, parties of the second part, hereinafter referred to as the Unions.

* * * * *

I.

Coverage

A. That this Agreement shall apply to and cover all employees of the Contractors employed to perform or performing construction work, as such employees and construction work are respectively more particularly defined hereafter in Article II Section A and Article XV of this Agreement, in the area known as Southern California, more particularly described as the counties of Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, San Diego, Ventura, Santa Barbara, San Luis Obispo and Kern.

* * * * *

II.

Union Recognition

A. That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective bargaining representatives of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such jurisdiction is defined by the Building and Construction Trades Department of the American Federation of Labor as of the date of this Agreement. It is understood that the Unions do not at this time, nor will they during the term of this Agreement, claim jurisdiction over the following classes of employees: executives, civil engineers, and their helpers, superintendents, assistant superintendents, master mechanics, time keepers, messenger boys, office workers or any employees of the Contractor above the rank of craft foreman.

That subject to this understanding the Contractor shall have entire freedom of selectivity in hiring and may discharge any employee for any cause which he may deem sufficient, provided there shall be no discrimination on the part of the Contractor against any employee, nor shall any such employee be discharged by reason of any Union activity not interfering with the proper performance of his work.

It is the intention of the parties that all workmen covered hereby shall be or become forthwith upon employment and remain continuously, members in good standing of the International Unions signatory hereto through their affiliated Local Unions having work and area jurisdiction and on whose behalf this Agreement is executed, as a condition of employment, and that this provision shall become operative without further notice or amendment whenever amendments to or judicial interpretations of the Labor-Management Relations Act of 1947 remove the inhibitions against the application of this paragraph now existing under the present wording and judicial interpretations of that Act.

It is agreed that all workmen covered hereby shall be or become, not more than thirty (30) days after employment and remain continuously, members in good standing of the International Unions signatory hereto through their affiliated Local Unions having work and area jurisdiction and whose behalf this Agreement is executed, and shall remain available for work as a condition of employment.

B. That in the employment of workmen for all work covered by this Agreement in the territory above described, the following provisions, subject to the conditions of Article II-A, above, shall govern:

1. That the Local Unions shall establish and maintain open and non-discriminatory employment lists for employment of workmen in the work and area jurisdiction of each respective Local Union of each particular trade.

That the Contractors shall first call upon the respective Local Unions having work and area jurisdiction, or their Agents, for such men as they may from time to time need, and the respective Local Unions, or their Agents, shall immediately furnish to the Contractors the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the Contractors.

That the respective Local Unions, or their Agents, will furnish each such required competent workman or skilled mechanic entered on their lists, to the Contractors by use of a written referral and will furnish such workmen or skilled mechanics from the respective Local Unions' listings in the following manner:

(a) Workmen who have been recently laid off or terminated in that respective Local Union's work and area jurisdiction by the Contractors now desiring to re-employ the same workmen in that same area provided they are available for employment.

(b) Workmen who have been employed by Contractors in the respective Local Union's work and

area jurisdiction within the multiple-employer unit during the previous ten (10) years, and are available for employment.

(c) Workmen whose names are entered on the list of the respective Local Union having work and area jurisdiction and who are available for employment.

That reasonable advance notice (but not less than 24 hours) will be given by the Contractors to the Unions, or their Agents, upon ordering such workmen or mechanics; and in the event that 48 hours after such notice, the Unions or their Agents shall not furnish such workmen, the Contractors may procure workmen from any other source or sources. If men are so employed, the Contractors will immediately report to the Local Unions having work and area jurisdiction, or their Agents, each such workman by name.

That workmen employed by the Contractors for a period of thirty (30) days continuously or accumulatively within the multiple-employer unit and procured in accordance with II, B-1, (c), above or procured from other sources by the Contractors themselves, shall become members of the appropriate craft Union signatory hereto immediately, upon terms and qualifications not more burdensome than those applicable at such times to other applicants to such Union.

2. Contractors may transfer workmen in good standing of the six basic crafts from the jurisdiction of one Local Union to the jurisdiction of another Local Union of the same craft up to the max-

imum permitted at the date of this Agreement by the International Constitution and By-Laws of the craft involved. In any event they may transfer up to 10 per cent of the current requirements by crafts on the project to which the transfers are to be made, including a maximum of two foremen in each craft. Contractors recognize the desirability of employing workmen in good standing of the Local Union having jurisdiction to the greatest possible extent and it is the intention of the parties that the Local Union having jurisdiction refers to the work jurisdiction and area jurisdiction of all appropriate craft Local Unions affiliated with any Union signatory hereto as such work and area jurisdiction shall continue to be recognized, accepted and maintained.

Workmen employed by any Contractor pursuant to the terms of this Agreement, and remaining in good standing in the craft in which they are employed, shall not be removed nor transferred by the Unions unless the prior approval of the Contractor has been obtained.

C. Whenever reference is made in this Article II to the Agents of the Unions, such reference is intended to designate the representative of the Building and Construction Trades Council or the Local or International craft Union having jurisdiction over the workmen employed or to be employed by the Contractor.

* * * * *

Redirect Examination

* * * * *

Q. (By Mr. Heimann): Mr. Sills, I show you

(Testimony of Edward M. Sills.)

a document which has been marked G.C. 24 for identification and which consists of two postcards stapled to each other. Would you tell us what that document is or what these documents are?

A. They are the signature of the Pardee Construction Company on the method on which we used to sign the master labor agreement.

* * * * *

Q. (By Mr. Heimann): Do you know the reason why there are two cards for Pardee Construction Company? [709]

* * * * *

The Witness: Just what they explained to me, they said they had forgotten to sign the agreement before.

Mr. Garrett: I move to strike. There's no foundation, not even as to who they mean.

Trial Examiner: I will sustain the objection as to foundation.

Whom do you mean by "they"?

The Witness: Pardee Construction Company.

* * * * *

Q. (By Mr. Heimann): Which individual of Pardee Construction Company?

A. J. D. Pardee and Hoyt S. Pardee signed two cards.

* * * * *

Q. (By Mr. Heimann): Does the BCA require its members after they had signed one card to sign any other card or to sign the same card again?

* * * * *

(Testimony of Edward M. Sills.)

The Witness: No, they do not require them to sign more than one card.

* * * * *

Voir Dire Examination

Q. (By Mr. Garrett): Those cards received by you stapled together, or were they stapled together after they had been received by you?

A. One card is dated May of 1948 and the other was November of 1949 so evidently they were received at different times. [711]

* * * * *

Q. In connection with one of these cards, it is a fact, is it not, that someone had told you that they had forgotten to sign the agreement before.

* * * * *

The Witness: When the second card came in, as I stated before, all of them come across my desk. I have a pretty good memory so I knew that the Pardee Construction Company had previously signed the agreement or signed one of these cards purporting to sign the agreement. I asked the girl to bring the card in, to look up the other card. She brought it in. Neither one of the Pardees was present. I called them and asked them why they signed this card.

* * * * *

Q. (By Mr. Garrett): Who did you talk to when you called, if you remember?

A. I can't recall which Pardee it was.

Q. Was it one of the partners?

A. One of the Pardees, yes.

(Testimony of Edward M. Sills.)

Q. Do you remember whether it was one of the sons or the old man? [713]

A. I do not recall. I don't recall who it was I talked to. * * * * *

Q. And you asked that person on the telephone why you had received the second card, is that right?

A. That's right. [714]

Q. Because you already had one, is that right?

A. That's right.

Q. That person told you it was because they had forgotten to sign the agreement before?

A. He said he thought he had not signed the agreement before. * * * * * [715]

Mr. Heimann: I now move to amend the complaint in Case No. 21-CB-600 by eliminating a period at the end of Paragraph 5 and by adding the following words: "and are thereby causing or attempting to cause above-named employers to discriminate against employees in violation of Section 8 (a) (3) of the Act."

I further move to amend Paragraph 6 by striking the words "Subsection 1 (A)" at the end thereof and by substituting therefor the words "Subsections 1 (A) and (2)."

I further move to amend Paragraph 8 by striking therefrom at the end the words "Subsection 1 (A) of the Act" and by substituting therefor the words "Subsections 1 (A) and (2) of the Act."

* * * * *

Trial Examiner: I would like to get a clarification. You will recall one of the last orders of busi-

ness at the prior session was a request on my part of a statement of General Counsel's theory of the case and outline of what the General Counsel expected to prove so that the respondents might be adequately informed and might use the interval [745] provided by our adjournment to engage in any necessary preparation in order to obviate a further recess at the conclusion of the General Counsel's case. Let me ask this, having in mind the General Counsel's theory of the case and the nature of proof which the General Counsel expected to adduce, does this amendment indicate the possibility of any change in the nature or extent of proof?

Mr. Heimann: It does not, Mr. Examiner. In other words, to make it clear, as I indicated at the close of my remarks before we adjourned, I stated then that the amendment will not entail any additional evidence nor will it entail any allegation on the part of the General Counsel that the contract between the union and the employers is illegal nor does it entail any allegation that any particular employer is directly involved in Case 21-CB-600 and, by that, I mean that General Counsel will offer no evidence that any particular employer offered employment to Clarence Dowdall which he could not accept because the union declined to refer him so, in that respect, the theory is not changed at all. The only change is that it is our theory now that the acts that we have always alleged to have occurred constitute not only a violation of Section 8 (b) (1) (A) but constitute also a violation of Section 8 (b) (2). * * * * * [746]

Trial Examiner: Very well, I'm in position to rule. * * * * * [807]

The motion to amend is granted and the record will now so show. [809]

* * * * *

Mr. Nicoson: Very well. We then move to amend respondents' separate and several answers by amending Paragraph 5 thereof to generally and specifically deny Paragraph 5 of the complaint as amended. We move to amend Paragraph 6 of the respondents' separate and several answers by denying both generally and specifically the allegations of Paragraph 6 as now amended. And we move to amend Paragraph 7 of the answer to deny generally and specifically the [815] allegations of Paragraph 8 of the complaint as now amended. I'm sorry, it was Paragraph 8 of the answer instead of 7.

* * * * *

Mr. Nicoson: I also move to amend the answer with respect to the second and separate further defense so that the answer to Paragraphs 5, 6 and 8 are reflected in a similar fashion in the second defense. [816]

* * * * *

Trial Examiner: Mr. Heimann indicated no objection to the motion to amend respondents' answer to 21-CB-600 and I may say for the record, I'm, of course, disposed to grant the motion to amend the answer and I would, of course, read the answer as amended to include a traverse at every relevant point of the complaint as amended.

Mr. Heimann: I have no objection. I state that again.

Mr. Nicoson: Now, then, I suppose, and this may arise through a superabundance of caution and I will ask you to bear with me. Directing my attention now to Paragraph 2 in the third, separate defense, I move to amend that paragraph by interlineation to insert directly after the word "Subsection 8 (b) (1) (A)," the word "and (2)."

Mr. Heimann: No objection.

Trial Examiner: Motion granted.

Mr. Nicoson: While I'm at it, I notice a typographical error.

Trial Examiner: I will take it as "charges" instead of "charters."

Mr. Nicoson: I move the answer be amended in those particulars. [817]

Trial Examiner: Motion granted. [818]

* * * * *

(Thereupon the documents above-referred to were marked General Counsel's Exhibits No. 24-A and 24-B and were received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 24-A

Date: 5/17/48

It is my desire to sign and avail myself to the benefits of the Collective Bargaining Agreement between the Building Contractors Association of California, Inc., and the Building Trades Councils of the American Federation of Labor, by affixing my signature to this card in lieu of the Master Contract which I agree to sign when presented to me.

Firm Name: Pardee Construction Company

/s/ By Hoyt S. Pardee, Partner.

Phone: Ariz. 96908

Address: 10639 Santa Monica Blvd., Los Angeles
25, Calif.

License No.: 94236

Classification: B-1

[Business Reply Card]

Building Contractors Association of California, Inc.

121 South Alvarado

Los Angeles 4, California

GENERAL COUNSEL'S EXHIBIT No. 24-B

Date: 11/13/49

It is my desire to sign and avail myself to the benefits of the Collective Bargaining Agreement between the Building Contractors Association of California, Inc., and the Building Trades Councils of the American Federation of Labor, by affixing my signature to this card in lieu of the Master Contract which I agree to sign when presented to me.

Firm Name: Pardee Construction Co.

/s/ By J. D. Pardee

Phone: BR 25498

Address: 10639 Santa Monica Blvd.

License No.....

Classification: B1

[Business Reply Card]

Building Contractors Association of California, Inc.

115 South Alvarado

Los Angeles 4, California

* * * * *

CLARENCE A. DOWDALL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Heimann): Will you state your name, please? A. Clarence A. Dowdall.

Q. And your address?

A. 3826 Olmstead Avenue, Los Angeles 8, California, in care of Irwin Emerson.

Q. What is your occupation, Mr. Dowdall?

A. Carpenter.

Q. Have you been a member of any labor union within the last four years? A. Yes.

Q. Would you tell us what labor union and what locals you belonged to and the approximate dates? A. In the last four years?

Q. Yes.

A. In the last four years, I belonged to the local in Palm Springs, California, and Anchorage, Alaska.

Q. And when did you belong to the local at Palm Springs?

A. I have also been a member of the local in Pasadena, [909] California, too.

Q. I see. When were you a member of Palm Springs local, approximately?

A. Well, I first cleared in Palm Springs about eight years ago and then I have cleared out of Palm Springs into—I tell you, I cleared in and

(Testimony of Clarence A. Dowdall.)

out of so many locals, I have the dates. I don't know until I look them up. I have all the records.

Q. Let's just take the California locals.

A. All right.

Q. Do you know how long you were a member of Palm Springs local?

A. About eight years, well, say, yes, the Palm Springs local.

Q. Well, you said you cleared into the Palm Springs local about eight years ago.

A. That's right.

Q. Then if you were a member for eight years, it would be until very recently, at least?

A. Yes, sir, I cleared out of the local in Palm Springs in November of '52, cleared into Pasadena, California.

Q. I see. How long were you a member of Pasadena local? A. Four months.

Q. Four months?

A. I cleared back into Palm Springs.

Q. After that you cleared back into Palm Springs? [910] A. Yes.

Q. About how long? A. One week.

Q. And after that?

A. I cleared out of there and went to Anchorage, Alaska.

Q. Did you clear into the Anchorage local?

A. Yes, sir, and I'm still a member of the local in Anchorage, Alaska.

Q. In other words, from that time on you have been a member of the Anchorage local without fur-

(Testimony of Clarence A. Dowdall.)

ther interruptions? A. Yes, sir.

Q. Now, in December of 1953 did you go to the job site, or, to a job site of the Pardee Construction Company? A. I did, yes, sir.

* * * * *

Q. (By Mr. Heimann): And would you tell us what events happened that caused you to go there?

* * * * *

The Witness: Mr. Dockery called me and asked me if I was interested in going to work.

Q. (By Mr. Heimann): When was that?

A. December, the morning of December 3rd. I told him I was.

Mr. Nicoson: I'm going to object now further to any conversations he had with Dockery on the grounds hearsay, not binding upon respondents.

Trial Examiner: Overruled.

The Witness: I told him, yes, I wanted to go to work so Mr. Dockery said, "Well, I believe I have a job for you."

Mr. Garrett: Move to strike it on the grounds it is hearsay.

Trial Examiner: Overruled. Motion to strike denied.

Mr. Nicoson: May we have a continuing objection?

Trial Examiner: You have a continuing objection on the ground it is hearsay. For the record, the objection is overruled.

Q. (By Mr. Heimann): Go ahead.

A. Mr. Dockery came and got me and we went

(Testimony of Clarence A. Dowdall.)

to the job site the morning of December 3rd. He introduced me to a Mr. Lancaster, a superintendent. I talked with Mr. Lancaster about a job and he told me yes. * * * * * [912]

Q. (By Mr. Heimann): You say you saw Mr. Lancaster. Do you know who Mr. Lancaster was?

A. Mr. Dockery introduced me to him as the superintendent of the Pardee Construction Company.

Q. Did you have a conversation with Mr. Lancaster? A. Yes, I did, yes, sir.

Q. Who was present? A. Mr. Dockery.

Q. Anyone else?

A. Mr. Lancaster and myself. [913]

* * * * *

Mr. Garrett: Objection on the further ground hearsay as to these respondents.

Mr. Nicoson: May our objection continue to the entire conversation?

Trial Examiner: You have a continuing objection to the conversation with the participants last named by the witness and, for the record, the objection is overruled.

Q. (By Mr. Heimann): Before I repeat the question, will you tell us where the conversation took place?

A. On Sunset, I remember the number, 14—I don't remember exactly the job site.

Q. What community, if you know?

A. Sunset Boulevard, clear the west end of Sunset Boulevard.

(Testimony of Clarence A. Dowdall.)

Q. Do you know whether Sunset Boulevard runs through Hollywood and West Hollywood and several other communities, do you know which one it was or was it in Los Angeles proper, if you know?

A. I don't know exactly where it was. I know exactly where it was but I don't remember the address.

Q. All right. Would you tell us what you said, what Mr. Dockery said and what Mr. Lancaster said, if anything? * * * * * [914]

The Witness: Mr. Dockery introduced me to Mr. Lancaster and so Mr. Lancaster told us that he needed a couple carpenters so after talking with him, why, he decided to hire me. * * * * * [915]

Q. (By Trial Examiner): Mr. Dowdall, in reference by Mr. Lancaster to his needs, if any, for carpenters, as you now recall it, is your knowledge of it based upon what Mr. Dockery told you about an earlier conversation or is it based upon what you heard Mr. Lancaster say?

A. Mr. Lancaster, as I say, Mr. Dockery came to my house and got me and taken me out and Lancaster told me that he could [916] use me as a carpenter, needed a couple carpenters.

Q. That statement was made to you?

A. Yes, sir.

Q. At the time and place you indicated?

A. When I was out there.

Q. What reply did you or Mr. Dockery then make to Mr. Lancaster?

(Testimony of Clarence A. Dowdall.)

A. I told Mr. Lancaster that I was ready to go to work as a carpenter. So he asked me if I belonged to the union and I told him yes. So he told me, he said, well, before, he asked me where my membership card was and I told him in Anchorage.

And he said, "Before you're available to go to work on this job, you must go down to Local 1400 and get a work order, or a permit, and clear through the local before you can go to work on this job." [917]

* * * * *

The Witness: So he written a request and I taken it to Local 1400.

* * * * *

Q. (By Mr. Heimann): I show you a paper that has just been marked——

A. Yes, sir, that is the one.

Q. Just a minute. ——that has just been marked G.C. 27 for identification and I ask you if that is the request that you were just talking about.

A. Yes, sir, that is the request. [918]

* * * * *

Mr. Nicoson: We object to the document, first, on the grounds there is no proper foundation having been laid; secondly, hearsay with respect to these respondents; third, the document is not in its original state having been altered by the witness; it is incompetent, irrelevant and immaterial, it is conclusionary, hearsay and not the best evidence.

(Testimony of Clarence A. Dowdall.)

Trial Examiner: Objection overruled. General Counsel's 27 will be received.

Mr. Nicoson: Your Honor, perhaps you didn't quite follow my objections closely but there isn't any proof here that that is Lancaster's signature.

Trial Examiner: I'm aware of whatever infirmities may be in the document but I think it is sufficiently identified to warrant its receipt in evidence.

(The document heretofore marked General Counsel's Exhibit No. 27 for identification was received in evidence.) [920]

Direct Examination—(Continued)

Q. (By Mr. Heimann): Mr. Dowdall, you said that you inserted, or you put on this document which is G.C. 27 a matter in the lower left-hand corner? A. Yes, I did.

Q. Would you tell us exactly what you put on so that we know which matter you put on?

* * * * *

The Witness: "Dated by C. Dowdall, December 2, 1953." But I want to say that when I dated——

* * * * *

The Witness: That should have been dated December 3rd. [921]

* * * * *

Q. (By Mr. Heimann): Mr. Dowdall, other than these words you have just related, who put on the writing on G.C. 27?

* * * * *

(Testimony of Clarence A. Dowdall.)

The Witness: As I get it straight, he wants to know who written it and all that?

Trial Examiner: Let the record show that the witness in directing a question to the Trial Examiner inquires whether the question relates to the body of General Counsel's 27 exclusive of the material previously indicated in the lower left-hand corner.

The answer to your question is, yes, that is what the question refers to.

The Witness: Yes, Mr. Lancaster written this.

Q. (By Mr. Heimann): Now, you stated that the date should not be the date that you put on or some words to that effect. Will you explain that further? [922]

* * * * *

The Witness: Yes, when I dated that I put December 2nd, 1953, which I should have put December 3rd, 1953, on a Thursday.

Q. (By Mr. Heimann): Would you tell us why it should be December 3, 1953?

* * * * *

The Witness: Because I was out there on the job on the 3rd when Mr. Lancaster written it. [923]

* * * * *

Q. (By Mr. Heimann): After Mr. Lancaster handed you G.C. 27, Mr. Dowdall, did you have any further conversation with Mr. Lancaster?

A. No.

Q. Would you tell us what you did then? [924]

(Testimony of Clarence A. Dowdall.)

A. We came down to Local 1400 and met Mr. Bill Savage.

Trial Examiner: When you say "we," who would that mean?

The Witness: Mr. Dockery and I.

Q. (By Mr. Heimann): And where was that? Where did you meet Mr. Savage?

A. In the union hall on Santa Barbara, I believe, on Santa Barbara Boulevard.

Q. What town? A. Santa Barbara.

Q. Pardon?

A. I guess Santa Barbara—Santa Monica.

Q. And then on what boulevard?

A. Seems like to me Santa Monica Boulevard.

Trial Examiner: Just a minute. If we are going to have conversation outside, did you have any conversation with Mr. Savage at that place and at that time?

The Witness: Yes, I told him I——

Q. (By Mr. Heimann): Just a minute. Who was present at that time at that conversation?

A. Mr. Dockery, Mr. Savage, myself.

Q. And would you tell us who said what during that conversation?

A. I showed——

Mr. Nicoson: Object, I don't believe he's given the time.

Trial Examiner: He has not. Do you recall when this occurred? [925]

The Witness: I would say about 2:00 p.m.

Trial Examiner: On what day?

(Testimony of Clarence A. Dowdall.)

The Witness: Thursday, December 3rd, 1953.

Trial Examiner: Very well.

Q. (By Mr. Heimann): Now, would you tell us who said what during that conversation?

A. Mr. Dockery said to Mr. Savage, "We have work orders for Pardee Construction job."

We showed him our work orders, wanted him to write——

Q. Just a minute. When you refer to "work orders," what do you mean by that?

A. Work clearance.

Trial Examiner: What did you show him, specifically?

The Witness: We showed him this piece of paper.

Trial Examiner: Let the record show the witness indicates General Counsel's 27.

Q. (By Mr. Heimann): Was there any other paper you showed him?

A. Yes. Mr. Savage wanted to know where my membership card was, if I belonged to the union. I told him yes. [926]

* * * * *

Q. (By Mr. Heimann): Mr. Dowdall, did you see whether Mr. Dockery showed Mr. Savage a document? A. Yes.

Q. What did you see him show to Mr. Savage?

A. He showed him his written request for work order to the job.

Mr. Nicoson: I object to that, move to strike on the ground no testimony of this witness that

(Testimony of Clarence A. Dowdall.)

he had a work order; secondly, if there was such a document, that is the best evidence of what he handed him.

Mr. Heimann: Mr. Examiner—

Mr. Nicoson: On the further grounds that no foundation laid that this fellow knows what's on that piece of paper that Mr. Dockery had.

Mr. Heimann: Mr. Examiner, I may be wrong in my recollection but my recollection is that Mr. Dockery testified on that matter so that is in the record. I can look it up if you wish.

Mr. Nicoson: He didn't have any written document to put in there.

Mr. Heimann: No, he did not.

Trial Examiner: Let's look at the record.

Mr. Heimann: It starts on Page 120. I didn't look any further yet. [928]

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Objection overruled.

Mr. Nicoson: While we are on the record, it may be interesting to point out your Honor to a couple objections that were made and sustained by the prior Trial Examiner with respect to the conversation between Mr. Dowdall and Mr. Dockery. I just call it to your attention to show the inconsistency of the rulings of the Trial Examiners.

Trial Examiner: The present objection is overruled. I'm satisfied that the record with respect

(Testimony of Clarence A. Dowdall.)

to Mr. Dockery's testimony as to his conduct at the union hall warrants overruling of the present objection.

Mr. Nicoson: We want to object at this time to the testimony of this witness with respect to what happened in the union hall on the grounds it is hearsay as to the District Council of Carpenters.

Trial Examiner: Overruled. [929]

* * * * *

Q. (By Mr. Heimann): Now, continue and tell us what was said by Mr. Savage, Mr. Dockery and yourself, if anything.

A. I showed Mr. Savage my due book, showing that my dues were paid through March, 1954, in Anchorage, Alaska. * * * * * [930]

Q. (By Mr. Heimann): Mr. Dowdall, do you know what your status was at that time regarding your membership in the Anchorage local?

* * * * *

The Witness: My membership was paid through March, 1954, at Anchorage, correct.

Mr. Garrett: Objected to as hearsay as to these [931] respondents, not the best evidence.

Trial Examiner: Objection overruled.

Q. (By Mr. Heimann): Did you have your dues book with you, Mr. Dowdall?

A. Yes, sir.

Mr. Heimann: At this time I would like to make the dues book available for the inspection of re-

(Testimony of Clarence A. Dowdall.)

spondents' counsel. May the record show that that is being done?

Will you pull it out and show it to them?

Trial Examiner: The record will so show.

Mr. Nicoson: May this be marked for identification so that the record will show what we are looking at?

Trial Examiner: The record shows we are looking at the book produced by Mr. Dowdall.

Mr. Nicoson: It doesn't yet.

Trial Examiner: If it didn't, it does now.

Mr. Nicoson: You have objections to having it marked for identification?

Trial Examiner: I see no necessity to encumber the document with markings. Essentially, what we have here at this time is the witness testifying from personal knowledge as to his paid-up status in the labor organization. Now, if his knowledge is also reflected in the written document in his possession, the production of that document may buttress his testimony with respect to his personal knowledge [932] but it does not necessarily constitute evidence which would have to be received as preferable to his personal knowledge.

Essentially, it appears to be a document which could be used to refresh his recollection. As such, a document used to refresh recollection does not have to be identified and be shown in the record by identification number.

Mr. Nicoson: That can be brought up when the document is offered in evidence.

(Testimony of Clarence A. Dowdall.)

Mr. Heimann: May I say that it be read into evidence rather than having it marked for identification?

Mr. Nicoson: All we are asking is that it be marked for identification. We are not offering the document yet and what you have said may be applicable upon the offer of this document into the record as a part of the record but to the present time, it hasn't been offered. We simply ask that it be marked for identification.

Mr. Heimann: Mr. Examiner, may I say also that I did not ask the witness to refresh his recollection by that document.

Trial Examiner: No——

Mr. Heimann: And that my single and sole purpose for asking Mr. Dowdall to produce it was lest there be any reflection or intimation in the record that I'm trying to conceal something. I have not intended to have the document identified nor offered in evidence nor have Mr. Dowdall use it for the purpose of recollection. [933]

Trial Examiner: I realize that. Insofar as the document itself would, upon inspection, tend to establish the date to which Mr. Dowdall may be a paid-up member of some labor organization, it would seem to me to be merely corroborative evidence insofar as his personal knowledge is concerned. [934]

* * * * *

Trial Examiner: We are elaborating here at great length a matter which in normal proceedings

(Testimony of Clarence A. Dowdall.)

before the Labor Board is normally taken care of by a physical inspection and, if necessary, a reading into the record of the contents of such a document. [935]

* * * * *

Trial Examiner: As I view this issue, I don't think that in a situation of this kind the best evidence rule is necessarily applicable because the apparent issue of fact at the moment is the question of Mr. Dowdall's status as a paid up member of Local 1281 at a particular time.

Now, as to that, as I view it, Mr. Dowdall is perfectly capable of testifying as to the fact on the basis of personal knowledge, he having been the individual to allegedly present himself as having paid dues. If an individual is testifying to a fact that he knows as of his own personal knowledge, the fact that the circumstance may also be evidenced in a written document does not necessarily [939] make the written document the best evidence because we are here interested in facts, not the contents of the document, and the issue to be proved.

Mr. Nicoson: That is your position.

Trial Examiner: I'm stating it for the record, yes.

Mr. Nicoson: I just don't want our silence to mean we concur.

Trial Examiner: I just don't so construe. I want the opportunity to finish my statement. I will have it.

Under the circumstances, I believe the record will

(Testimony of Clarence A. Dowdall.)

show that I indicated upon an objection timely made by respondents that while I did not concur in the objection on the grounds stated by Mr. Garret, counsel might wish to consider whether or not other independent evidence bearing upon the issue of Mr. Dowdall's paid-up status in 1281 was available and might be offered in this proceeding. Thereafter, the record will show the witness was asked to produce his dues book purportedly indicating certain dues payment to 1281.

Now, with respect to the issue of fact, I view the dues book not as the best evidence with respect to dues payments but merely as additional evidence of a corroborative character with respect to dues payment to whatever extent it may reveal such dues payments. [940]

* * * *

Q. (By Mr. Heimann): Mr. Dowdall, would you continue with your testimony relating to the discussion between Mr. Savage, Mr. Dockery and yourself? * * * * *

The Witness: Well, I think I got as far as I showed to Mr. Savage my paid up dues, hadn't I?

Q. (By Mr. Heimann): Yes, I believe that is right. * * * * *

The Witness: In showing him my work order to go to work on——

Trial Examiner: In order to avoid confusion in this record, let me say, Mr. Dowdall, that I [942] have been apprised by reading the record up to this point, specifically, the testimony of Mr. Dockery,

(Testimony of Clarence A. Dowdall.)

that there is some technical significance to be attached to the phrases "clearance, work order, work permit" and so on. And in order to avoid difficulties and confusion, I would like us to be as specific as possible in referring to these particular documents.

What do you refer to when you say that you showed him this "work order"?

The Witness: That is what I showed him, a request for work order as the superintendent requested.

Trial Examiner: Let the record show that the witness indicates General Counsel's 27.

I suggest that we call that Mr. Lancaster's request rather than giving it any special title which may be confusing the record.

The Witness: After showing Mr. Savage my request for work order, showing my dues had been paid in Anchorage, Alaska, he said before I could go to work in this jurisdiction that I would have to go down to the District Council which is down here on Maple, Seventh and Maple, I believe, and get a work permit from them. So Mr. Dockery and I left.

Q. (By Mr. Heimann): Just a minute. Did Mr. Savage say anything else to you?

A. Mr. Savage said we would have to go down and get a permit from them and then come back and he would send us out to the [943] job, that he would write us——

Q. Did he say anything else about the procedure

(Testimony of Clarence A. Dowdall.)

followed—— * * * * *

The Witness: Not as I recall, no.

* * * * *

Q. (By Mr. Heimann): Specifically, did he say anything about registration?

Mr. Garrett: I object to that question as being leading. He is putting words in the witness' mouth.

Trial Examiner: I have overruled the objection on the ground that the witness has indicated his recollection is exhausted.

Mr. Nicoson: Yes, but, your Honor, that isn't the proper way to refresh the witness' recollection after the indicated exhaustion by putting the specific answer in his mouth.

Trial Examiner: You have your error.

Mr. Nicoson: We certainly do.

Trial Examiner: Very well. [944]

* * * * *

The Witness: No, sir, he did not at that time.

Q. (By Mr. Heimann): Would you tell us what you did then?

A. Mr. Dockery and I left and went out to Mr. Dockery's home. We did not go to the Labor Temple that day because we thought it was too late and we wouldn't have time to come down before the office was closed.

Mr. Nicoson: Move to strike what the witness thought as being not responsive, purely a voluntary statement on the part of the witness.

Trial Examiner: Motion to strike denied.

Mr. Nicoson: You mean the mental observations

(Testimony of Clarence A. Dowdall.)

from the witness are going to get in in the absence from and apart of respondents——

Trial Examiner: I think the matter entirely immaterial. Let's go ahead.

Mr. Nicoson: Let the record show we resent the surly remarks of the Trial Examiner which now have been made in an angry tone.

Trial Examiner. The record will so show. Let's proceed.

The Witness: Mr. Dockery and I left the Labor Temple and went out to Mr. Dockery's home, as we did, as we would not have time to go down to the Labor Temple and get out to [945] the union hall before 4:00 o'clock. It would be closed so we decided to wait and go early Friday morning.

* * * * *

Q. (By Mr. Heimann): Did you do so on Friday morning?

A. Mr. Dockery, Mrs. Dockery and I got up to Friday morning——

Q. Who got up to Friday morning, will you repeat?

Trial Examiner: It's in the record, I assume.

The Witness: Mr. Dockery, Mrs. Dockery and myself.

Q. (By Mr. Heimann): I see.

A. Got up to Friday morning, drove to the Labor Temple down here on Ash Street—well, it's about——

Mr. Nicoson: Let's have what he said.

The Witness: Well, it's a couple streets over

(Testimony of Clarence A. Dowdall.)

here, I forget what the name of it is now, Maple Street, 700 block on Maple Street.

Q. (By Mr. Heimann): Would you tell us——

A. We went there on a Friday morning. We went up to about the seventh floor to the District Council's office. We showed the lady that came to the desk to wait on us our work order. We told her that Mr. Savage from Local 1400 had requested us to come here and get a work permit.

Trial Examiner: When you say "we told her," did you both——

The Witness: Mr. Dockery and I. [946]

Trial Examiner: ——did you both speak?

The Witness: I would say I spoke for myself.

* * * * *

The Witness: So we showed the lady, I showed the lady my due book.

Q. (By Mr. Heimann): Do you know the name of the lady? A. No, I do not.

Q. Where was the lady?

A. In the office of the District Council.

* * * * *

Q. (By Mr. Heimann): Do you know what District Council?

A. District Council of Carpenters, AFL.

Q. Do you know of what area?

A. Los Angeles County.

Q. All right. Would you continue to tell us your conversation with the lady?

A. I gave the lady my due book. She had [947] taken it and went into another office and in about

(Testimony of Clarence A. Dowdall.)

15, 10 minutes she came back, handed me back my due books, also, a permit card stating good for work in 30 days.

Mr. Nicoson: Object to what the permit stated. Move to strike. Obviously it is a written document and he is trying to interpolate it, not the best evidence, no showing it is available for the best evidence.

Trial Examiner: If you had looked across the table, you would see it coming in right now.

Mr. Nicoson: In order to come in in the proper fashion is what I'm talking about.

Trial Examiner: Very well, objection overruled.

Mr. Heimann: Will you mark this next in order, please?

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 28 for identification.)

Q. (By Mr. Heimann): Mr. Dowdall, I show you a document that has just been marked G.C. 28 for identification and I ask you if that is the document that you have just referred to.

A. That's right, that is the document.

Mr. Heimann: I offer G.C. 28 for identification in evidence.

Mr. Garrett: Now, wait a minute. Let's see the original. We are going to object to its introduction on the ground that no proper foundation has been laid, that it's hearsay as to both of these respondents, that it does not appear authentic [948] in the, it contains no signature and is, therefore, not en-

(Testimony of Clarence A. Dowdall.)

titled to admission in view of the fact that the foundation for an unexecuted document has not been laid, hearsay as to the respondent, Local 1400, and not the best evidence.

Trial Examiner: Objection overruled. General Counsel's 28 will be received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 28 for identification was received in evidence.)

[See page 598.]

* * * * *

Mr. Heimann: Mr. Examiner, pursuant to your direction, I have secured amended complaints and I offer the amended complaint in evidence now and at the same time want to serve counsel for respondents, or, rather, serve respondents through their counsel.

What's the next number?

Trial Examiner: I suggest it be marked 1-NN.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 1-NN for identification.)

Mr. Heimann: I now offer General Counsel's 1-NN in evidence.

Mr. Nicoson: Let the record show we have heretofore stated objections to the amendment. That is, orally offered by Mr. Heimann and for convenience, we'd like to state the same objections, same arguments to the receipt of this document. I assume the ruling is the same.

Trial Examiner: Very well. For the record, the

objections as incorporated at this point by reference are overruled and General Counsel's 1-NN will be received in evidence as a copy of the complaint as amended.

(The document heretofore marked General Counsel's Exhibit No. 1-NN for identification was received in evidence.) * * * * *

CLARENCE A. DOWDALL

Direct Examination—(Continued)

Q. (By Mr. Heimann): Mr. Dowdall, will you tell us what, if anything, happened after you received the temporary working card which is G.C. 28?

A. The lady give it to me and she said, "Mr. Dowdall, that will be \$3.00."

So I gave the lady \$3.00 and she gave me the receipt. * * * * *

Q. (By Mr. Heimann): I show you a document that has just been marked G.C. 29 for identification and I ask you if that is the receipt that you just referred to. A. It is.

Q. I call your attention to the writing on the back of that receipt and I ask you who put that on.

A. I put it on.

Q. Other than the writing on the back, did you put anything on that receipt? A. No, sir.

Q. Is the receipt in its present form in the [951] same form, in the same form in which it was handed to you other than for the writing on the back? A. It is. * * * * * [952]

Q. (By Mr. Heimann): Mr. Dowdall, would you tell us again if you have done so before, other-

(Testimony of Clarence A. Dowdall.)

wise, anew, how you came into the possession of this document which is G.C. 29 for identification?

* * * * *

The Witness: The lady at the counter of the Council of Carpenters handed this to me at the same time that I gave her \$3.00.

Q. (By Mr. Heimann): Is that the same lady that you testified about before the noon recess?

A. That's right, yes.

Q. Did she say anything when she handed you the document? [954]

* * * * *

The Witness: She said it would be \$3.00 so I gave her the \$3.00 and she handed me this receipt.

Q. (By Mr. Heimann): Did you see where the lady got the document from, if anywhere?

* * * * *

The Witness: She came out of a private office in the room.

Q. (By Mr. Heimann): Was the document all filled in when she came out of the office?

* * * * *

The Witness: Yes.

Mr. Heimann: I have no further questions.

Trial Examiner: On the basis of the entire record up to this point, I assume you press the same objections as previously made?

Mr. Garrett: We do.

Trial Examiner: Very well, objection is overruled. General Counsel's 29 will be received in evidence.

(Testimony of Clarence A. Dowdall.)

(The document heretofore marked General Counsel's Exhibit No. 29 for identification was received in evidence.) [955]

[See page 598.]

* * * * *

Q. (By Mr. Heimann): Would you tell us what you did then after this occurrence at the District Council?

A. Mr. Dockery, Mrs. Dockery and I drove to the Carpenter's hall Local 1400 in Santa Monica. We arrived there 12:00 o'clock. Mr. Savage was not in his office so we stepped into a little cafe and drank coffee and Mr. Savage happened to be in there so we waited until after he got through with his coffee. Then we went back to the office of the Labor Temple.

Q. By the way, you said about 12:00 o'clock, do you remember the date?

A. That was Friday, December 4th, 1953. I believe it was the 4th.

Q. You believe it was the 4th?

A. Yes, it was the first Friday in December, I know that. [957]

Q. I see. The calendar shows the first Friday in December to be December 4th.

Trial Examiner: Officially noted.

Q. (By Mr. Heimann): That was the same date or was it the same date as the date that you were at the District Council and the same date on which you received G.C. 28 and G.C. 29?

A. That's correct.

* * * * *

(Testimony of Clarence A. Dowdall.)

Q. (By Mr. Heimann): Would you continue to tell us what happened, if anything?

A. We left the cafe and went back to the Labor Temple. Mr. Savage at that time went in his office so we, I showed Mr. Savage my permit, from the District Council.

Q. Excuse me a minute, where did you say that happened? [958]

A. The Labor Temple office of 1400, Santa Monica.

Q. Is that generally referred to as the Labor Temple? * * * * *

The Witness: Yes, sir.

Q. (By Mr. Heimann): All right, will you tell us what happened after you saw Mr. Savage?

A. I showed Mr. Savage my request to go to work and, also, my temporary working card that I got from the District Council. He informed me, he says, he would not send me out on that job, that I would have to wait and see Mr. O'Hare. I asked him what, when Mr. O'Hare would be back and he said about 4:00 p.m. So I waited, Mr. Dockery, Mrs. Dockery and I waited until 4:00 p.m. until Mr. O'Hare arrived.

Q. At that time did you have any further conversation with Mr. Savage?

A. No, I did not. * * * * * [959]

Q. On that occasion did Mr. Savage mention anything about registration list?

A. No, sir, he did not.

Q. Will you tell us where you waited for Mr. O'Hare?

(Testimony of Clarence A. Dowdall.)

A. I waited on the parking lot at the union hall. Mr. Dockery, Mrs. Dockery and I.

Q. Did you see Mr. O'Hare on that day?

A. No, sir, not at that time, no.

Q. I asked on that day.

A. On that date, yes, later.

Q. Approximately what time did you see him?

A. 4:00 o'clock.

Q. Where was that?

A. In his office at the Carpenter's hall, Labor Temple.

Q. Santa Monica or Los Angeles?

A. Santa Monica. [962] * * * * *

Q. Who was present?

A. Mr. Dockery, Mr. Savage, Mr. O'Hare and later a Mr. Sam Mazurek came in the office.

Q. Was there any conversation at that time?

A. Yes

Q. Would you tell us who said what during that conversation?

A. Mr. Dockery spoke to Mr. O'Hare and we both showed him our work requests and our temporary working permits and told him we would like to be cleared to the Pardee Construction Company's job. This he refused. I asked him—— [963]

* * * * *

Trial Examiner: Instead of saying he refused, give us your present impression of the sense of what he said, can you now tell us as best you can recall exactly how he phrased it or as close as you can recall as to how he phrased any statement he may have made.

(Testimony of Clarence A. Dowdall.)

The Witness: He said he wasn't going to send us to the job. [964] * * * * *

Q. (By Mr. Heimann): Was there any further conversation, did anybody present say anything else at that time?

A. I asked him why he was not going to send us. He said, in the first place, he says, "You men had no business going out to the job soliciting your own jobs." He says, "I'm going to prefer charges against you and fine you for doing it." He says, "I'm also going to prefer charges against the superintendent," he says, "for writing those requests for you boys to be cleared to the Pardee Construction Company job."

Q. Was there any further conversation that you remember now?

A. I asked him why. He said, asked me if I had ever worked for this company before. I told him no. He says, "We have an agreement that you are supposed to work on that job within the last ten years." So he handed me one of those agreements.

Q. You say he handed you one of the agreements?

A. That's right. [965] * * * * *

Q. (By Mr. Heimann): Did you or Mrs. Dockery or Mr. Dockery or Mr. O'Hare or any of those present say anything else that you remember now?

A. I asked Mr. O'Hare what I was supposed to do in order to go to work here. He informed me they had a list there at the Labor Temple that I could put my name on that list, my telephone number, and he says, "I will call you when your turn comes to go to work."

(Testimony of Clarence A. Dowdall.)

So Mr. Savage gave me the list and so I signed my name and telephone number on the list.

Q. Would you describe that list, if you can?

A. My best recollection, it was a sheet of [966] white paper about 8 by 12 with about 25 or 30 names on it. And I think, I signed it. As near as I remember, my number was 87, 89, something like that.

Trial Examiner: Was there more than one such sheet?

The Witness: No, just one sheet of paper, one sheet of paper.

Q. (By Mr. Heimann): I'm not sure if I got your testimony correctly. About how many names did you say were on it?

A. There were about twenty-five, six, seven, something along there on this one sheet of paper.

Q. Were these names, were there numbers there?

A. Yes, there were numbers in front of the names.

Q. Do you know about what the first number was on that sheet?

A. No, I did not notice.

Q. Do you know whether it started with one?

A. No, I do not.

Q. Did you sign after the last name that was on that list or did you leave an empty space?

A. No, I signed after the last name that was signed on the list.

Q. And you say your number was about what?

A. 87, 88, somewhere along in the 80's, if I remember.

(Testimony of Clarence A. Dowdall.)

Q. Was anything else said at that time by any of the persons present?

A. Mr. O'Hare made the remark, he says, [967] "You men are a good deal like the soldier just came in here." He said, "He came in here and wanted right out to work, wanted to go right out to work." and he says, "he wouldn't let him so he says he is going down to V.F.W. and report us. So I told him to go ahead, I didn't care."

Q. Anything else?

A. He didn't use very nice language to tell about.
* * * * *

Q. (By Mr. Heimann): Can you tell us the general tone of voice in which he made any or all of these remarks?

* * * * *

The Witness: He used a very cross, loud voice talking to us.

Q. (By Mr. Heimann): Now, did anything else occur at that time, if you remember?

A. During our conversation, when I showed him my request to go out to, this job, he said he was going to prefer charges against me and fine me. He called in someone that was out in the Carpenter hall. I'm not sure who it was. He had an [968] office as near as I were in the other corner of the building to verify these requests because he said he wanted him as a witness because he was going to prefer charges against us and fine us for going out and soliciting our own jobs.

Q. Now, was that about the end or did anything else happen?

(Testimony of Clarence A. Dowdall.)

A. That was about the end, if I recall now.

Q. And did you leave then?

A. Yes, I left. [969] * * * * *

Q. (By Mr. Heimann): Mr. Dowdall, you testified before that Mr. O'Hare had asked if you had worked for Pardee before, is that correct?

A. Yes, sir.

Q. Did he ask you any other questions regarding your prior work record? [976]

A. No, sir.

Q. Did he ask you whether you had worked in the jurisdictional area of Local 1400 before?

A. No, sir.

Q. After that time, did you go to Palm Springs?

A. Yes.

Q. When did you go to Palm Springs?

A. I made two or three trips to Palm Springs along about the 20th of December, the last of December, the first of the year, I made three trips to Palm Springs.

Q. And for what purpose did you go?

A. Looking for employment.

Q. Did you find any employment at that time?

A. No, I did not.

Q. What did you do then after you didn't find employment?

A. I decided to go to Indio, California, and sign up for my unemployment.

Q. You say you decided to do that——

A. Yes.

Q. Did you do that? A. I did.

(Testimony of Clarence A. Dowdall.)

Q. When was that?

A. About the first, in the first part of November, 1954.

Q. First part of November?

A. January, January, January, about the 5th, I believe, or [977] 6th, somewhere in there.

Q. All right. And what happened at the Unemployment Compensation Office in Indio?

* * * * *

The Witness: Yes, I wanted to sign up for my unemployment compensation and the man asked me at the office if I belonged to a union and I told him yes. He wanted to, so I showed him my due book that I had and he explained to me, he says that I would have to go to some union and sign up and that the business agent would give me a number and, he says, when this business agent gives you this number, you bring it back to me and, he said, "I will let you and permit you to sign up for unemployment compensation."

So he asked me where I live and I told him Palm Springs. So I went to Palm Springs to sign at the union hall and get the [978] number and bring it back to him.

Q. (By Mr. Heimann): All right, did you go to Palm Springs then?

A. Yes, I did, I went to the union hall in Palm Springs.

Q. When was that?

A. That was on the 1st and 7th.

(Testimony of Clarence A. Dowdall.)

Q. Pardon? A. 1st and 7th of '54.

Q. The 1st and the 7th?

A. First month and 7th day.

Mr. Garrett: We renew our motion to strike that the compensation, the unemployment compensation is incompetent, irrelevant and immaterial, no proper foundation, hearsay as to these respondents.

Trial Examiner: Objection overruled. Motion to strike denied.

Q. (By Mr. Heimann): Do you know what local that was in Palm Spring to whose office you went?

A. United Brotherhood of Carpenters and Joiners of America, Local 1041, I believe. [979]

* * * * *

Q. (By Mr. Heimann): Did you see anyone at the union?

A. Yes, I saw the business agent, Mr. James Adams.

Q. Do you know Mr. Adams?

A. Yes, I do.

Q. And how long have you known him?

A. For, over four years.

Q. And did you have a conversation with Mr. Adams? A. I did.

Q. Was anyone else present?

A. A Mr. Ted Morris. He's recording secretary or financial secretary, I forget which. I don't go to the local enough to even know.

(Testimony of Clarence A. Dowdall.)

Q. Did you have a conversation with Mr. Adams? A. I did. [980]

* * * * *

Q. Did Mr. Morris participate in the conversation? A. No.

Q. Did he listen in, if you know?

A. I wouldn't say if he listened in or not.

Trial Examiner: Was he within hearing distance?

The Witness: Yes. [981]

* * * * *

Q. (By Mr. Heimann): Do you know what Mr. Adams' position was? A. Business agent.

Q. Pardon? A. Business agent.

Trial Examiner: You have known him in that capacity?

The Witness: I have known him in that capacity for four years.

* * * * *

Q. By Mr. Heimann): Now, will you tell us the conversation, who said what?

A. I told Mr. Adams I had been down to Indio to sign up for my unemployment and the man at the office told me that they had a list there in the union hall that I would have to come back up to Palm Springs and sign the list and he says the business agent, Mr. Adams, will give you a number and he says, "When you get that number, bring it back to me," and, he says, "then I can sign you up." [982]

(Testimony of Clarence A. Dowdall.)

So Mr. Adams, Mr. Adams wasn't going to let me sign the list.

Q. Just a moment. Will you tell us what Mr. Adams said?

Mr. Garrett: May the conclusion go out, Mr. Adams wasn't going to do this?

Trial Examiner: It will be disregarded.

The Witness: Mr. Adams wasn't going to let me sign.

Q. (By Mr. Heimann): Just a minute. Will you tell us what Mr. Adams said as closely as you remember?

A. Mr. Adams said, "That's right." I'm supposed to sign a list and have a number before I register. That is what Mr. Adams told me.

Q. Did he say anything else?

A. Yes, he said, "I will give you a permit and a number but you understand," he says, "you are not going to go to work on this permit here in Riverside County at all because," he said, "I'm not honoring no permits. You have to clear into this local before you can go to work."

I told Mr. Adams, "I didn't ask you for a job. I only asked you for a number so that I could sign up and draw my unemployment insurance."

So he written me a permit. [983]

* * * * *

Q. (By Mr. Heimann): Mr. Dowdall, I show you a document that has just been marked General Counsel's 30 for identification and I ask you if that is the document that you have just referred to.

(Testimony of Clarence A. Dowdall.)

A. That is the document referred to, yes, sir.

Q. Did you see that document being made out?

A. Yes, sir, I saw Mr. Adams write it.

Q. I call your attention to the words on the back of the document, "March 14" then "28" and then "No. 61."

Would you tell us if Mr. Adams wrote any of these words or figures?

A. Mr. Adams written the No. 61.

Trial Examiner: That is, he wrote the phrase which appears on the exhibit as capital N hyphen O period 61?

The Witness: Yes.

Trial Examiner: Very well.

The Witness: That was my number, 61.

Mr. Nicoson: Pardon?

Trial Examiner: "That was my number, 61."

Q. (By Mr. Heimann): And who wrote March 14 and 28?

A. I written March 14 and March 28 myself.

Q. I see. Who filled out the front of that card, if anyone? A. Mr. James Adams.

Q. Did you see Mr. Adams filling out the front out the card? A. I did. [984]

Q. And did you see Mr. Adams affix his signature to that document? A. I did.

Q. Who wrote the figure "5.00" on the left-hand side of the card in front?

A. Mr. Adams wrote that.

* * * * *

(The document heretofore marked General

(Testimony of Clarence A. Dowdall.)

Counsel's Exhibit No. 30 for identification was received in evidence.)

[See page 598.]

Q. (By Mr. Heimann): Did anything else happen at that time?

A. I accepted, I had taken the permit and started to go to Indio.

Q. I'm still at the union business office. Did anything else happen there? [985]

A. No, no.

Q. Did Mr. Adams say anything when he handed you the permit? A. He wanted \$5.00.

Q. What did he say?

A. I handed him a \$20.00 bill and he handed me back a ten and a five.

Q. He wanted \$5.00. Did he say he wanted \$5.00 or——

A. Yes, when he handed me that permit, he said, "That is \$5.00, I want \$5.00."

Q. I see. And then you handed him twenty and he handed you back fifteen?

A. I handed him twenty and he gave me fifteen back.

Q. Now, did he say anything else?

A. Not to my recollection, no.

Q. And then you left the union office, is that right? A. Yes, sir. [986]

* * * * *

Q. (By Mr. Heimann): Did you go to work after that? You said not for a few days.

A. Not for a few days.

(Testimony of Clarence A. Dowdall.)

Q. Did you find any work after more than a few days? A. Yes.

Q. How did you find the work?

A. I went to Desert Hot Springs, California, and asked a contractor over there for a job. He hired me and gave me a job.

Q. Do you remember the name of the contractor?

A. No, I don't right now. I have it in my records if you care to have me look in my pocket and find out.

Q. Did you get a job with that contractor right away after you asked for it?

A. Not that same day. He told me it would be about three days before I could go to work.

Q. Did you do anything in those three days?

A. Yes. [987]

* * * * *

Q. (By Mr. Heimann): Mr. Dowdall, do you remember the name of the contractor?

A. Calvin, C-a-l-v-i-n, Mr. Cohen, C-o-h-e-n.

Q. Now, will you tell us what you did during the two or three days that you waited for that job?

* * * * *

The Witness: Since Mr. Adams had gave me a No. 61, I decided to go back to Indio and sign up for my unemployment insurance. So when I got to Indio I showed him my number and all——

Q. (By Mr. Heimann): Whom?

A. To the unemployment agency,—— [989]

* * * * *

(Testimony of Clarence A. Dowdall.)

Q. (By Mr. Heimann): Will you continue?

A. Yes. I went to the unemployment agency and I wanted to sign up for unemployment insurance and told him Mr. James Adams gave me my No. 61 and before I filled the paper out, I told him that I had been offered a job two or three days ago.

So he said, he said, Mr. Dowdall, if you have been offered a job, you had better not sign up for the unemployment. I informed him that Mr. James Adams told me he wouldn't issue me a work order or permit so I couldn't go to work even if I did have a job.

And he said, "You better go back and tell Mr. Adams I said he was absolutely wrong. He better issue you a work order." [990]

* * * * *

Q. (By Mr. Heimann): Did you then go back to Palm Springs?

A. Yes, I went back to Palm Springs.

Q. Did you ever work for Mr. Calvin?

A. No, I never worked for Mr. Calvin.

Q. Did you work for Mr. Cohen?

A. I had never worked.

Q. Did you thereafter?

A. Yes, I worked for them after, yes, but I never worked for them before.

Q. I see. By the way, who was it, Calvin or Cohen that you worked for, or both?

A. Both.

Q. Do you know what that relationship is?

(Testimony of Clarence A. Dowdall.)

A. They are contractors. They are general contractors.

Q. Were they engaged on the same project?

A. Yes. [991]

* * * * *

Q. Do you know how long you worked for Calvin and Cohen?

A. I would say five weeks. [994]

* * * * *

Q. I see. After you had worked for Calvin and Cohen, did you take another job?

A. Not in Palm Springs at that time. I did later, yes.

Q. And where was that?

A. I came here to Los Angeles and worked in Los Angeles.

Q. When did you come to Los Angeles?

A. I came around the first of March.

Q. Did you work anywhere in February?

A. January and February I worked for Mr. Cohen and Calvin at Hot Springs.

Trial Examiner: Desert Hot Springs?

The Witness: That's right, yes, sir.

Q. (By Mr. Heimann): Did you have any other job in Desert Hot Springs? A. No. [999]

Q. Did you ever work for Cornelius & Lampan?

A. That was in May.

Q. I see. Would you tell us how you got the job with Cornelius & Lampan?

A. I saw Mr. Cornelius in Desert Hot Springs and I asked him for a job.

(Testimony of Clarence A. Dowdall.)

Q. And was that in May?

A. That was the last of May, yes, 1954.

Q. Now, in January and the time that you got the job at Cornelius and Lampan, were you referred to any job by the Carpenters Union?

A. No, sir.

Q. How did you work for Cornelius & Lampan?

A. Two weeks, I believe.

Q. During those two weeks, did you see any union official?

A. I saw Mr. James Adams at a distance.

Q. Is that the first union official you saw during the time that you worked for Cornelius & Lampan?

A. It is.

Q. Did you ever see Mr. Roy Lee during the time you worked for Cornelius & Lampan?

A. Yes.

Q. And when did you see him?

A. Oh, sometime in May. [1000]

Q. Is that the closest you can fix it?

A. Yes, it is.

Q. I see. Where was it?

A. In his home in Palm Springs.

* * * * *

Q. (By Mr. Heimann): Who was present during that conversation with Mr. Lee?

A. Mr. Lee and his mother and I.

Q. And his mother again? A. Yes.

Q. Anybody else? A. No. [1001]

Q. Did you talk about your work or anything pertaining to your work?

(Testimony of Clarence A. Dowdall.)

A. I told Mr. Roy Lee that I had a prospect of a job of going to work for Mr. Cornelius and Lampan and I told him, I said, "I want to keep straight with the union here so I can go to work."

I showed Mr. Roy Lee my due book that I was paid up in Anchorage, Alaska, so he written me a permit and gave it to me which entitled me to go to work for Mr. Lampan and Cornelius.

* * * * *

Q. (By Mr. Heimann): Where did Mr. Lee write that permit?

A. In Mr. Roy Lee's home in Palm Springs.

Q. And was there any conversation at that time that he gave you that permit either shortly before or shortly thereafter?

A. It was on a Sunday and Mr. James Adams, the business agent, wasn't, I don't know where he was, in Sacramento, someplace on business on some Carpenters convention, and he, Mr. Roy Lee was the acting business agent at that time.

Q. And was there any conversation?

A. Not that I recall now.

Q. You don't recall what the conversation was if there was any? A. Yes. [1002]

* * * * *

Q. (By Mr. Heimann): I show you a document that has just been marked G.C. 31 for identification and I ask you if that is the document that you just referred to. A. Yes, sir.

Q. I direct your attention to the document, to

(Testimony of Clarence A. Dowdall.)

the back of that card and I ask you who, if anyone, put the writing on the back.

A. I put the writing on there.

Trial Examiner: All of it?

The Witness: Yes, all of it.

Q. (By Mr. Heimann): That was going to be my next question.

A. I don't know what it means now, just an address of some place.

Q. All right, I call your attention to the writing in front of the card and ask you who put that writing there.

A. Mr. Roy Lee.

Q. All of it? A. Yes, sir.

Q. Did you see Mr. Roy Lee sign the card?

A. I did.

Q. Did you see him put all the other writing there?

A. Yes, sir. [1003]

Q. Did you see him put the sign and figures \$5.00 there?

A. Yes, sir.

Q. Did you pay him anything for it?

A. \$5.00.

Q. Did he ask you for it? A. Yes, sir.

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 31 for identification was received in evidence.)

* * * * *

Not to be issued for more than 15 days on applications.

MAISON 9-1987

LOS ANGELES COUNTY
DISTRICT COUNCIL OF CARPENTERS
ROOM 602 LABOR TEMPLE
TEMPORARY WORKING CARD

DATE DECEMBER 3, 1953ISSUED TO CLARENCE DOWDALLACCOUNT OF TompeyNOT GOOD AFTER JANUARY 3, 1954BY R. E. THOMAS, SEC'y.

CONTACT THE STEWARD WHEN REPORTING ON A JOB

NATIONAL LABOR RELATIONS BOARD

Docket No. 21-CB-548 etc OFFICIAL EXHIBIT NO. G.C. 28

Disposition { Identified ✓
Received ✓
Rejected ✓

In the matter of James W. Bro. of C. & J.
Date 12/13/54 Witness Dowdall Reporter Adm.

No. Pages

A 10120

Date 12/7/53

This is to Certify

That C. Dowdall has paid intoLOCAL No. Los Angeles County District
Council of Carpenters:Assessment \$ Clearance Card \$ ✓on Application Dues By R. E. THOMAS Agt. Total \$ 3.00

OH.

NATIONAL LABOR RELATIONS BOARD

Docket No. 21-CB-548 etc OFFICIAL EXHIBIT NO. G.C. 29

Disposition { Identified ✓
Received ✓
Rejected ✓

In the matter of J. 1400 In Bro. of C. & J.
Date 12/13/54 Witness Dowdall Reporter Adm.

No. Pages

SAN BERNARDINO AND RIVERSIDE COUNTIES'
DISTRICT COUNCIL OF CARPENTERS
SAN BERNARDINO, CALIFORNIA

TEMPORARY WORKING CARD

Date 1-7-54Issued to Clarence DowdallAccount of Street in Angeles D.C.Not Good After 30 DaysLocal No. 1046By James Adams
Business Representative
G.C. 30

NATIONAL LABOR RELATIONS BOARD

Docket No. 21-CB-548 etc OFFICIAL EXHIBIT NO. G.C. 30

Disposition { Identified ✓
Received ✓
Rejected ✓

In the matter of J. 1400 In Bro. of C. & J.
Date 12/13/54 Witness Dowdall Reporter Adm.

No. Pages

SAN BERNARDINO AND RIVERSIDE COUNTIES'
DISTRICT COUNCIL OF CARPENTERS
SAN BERNARDINO, CALIFORNIA

TEMPORARY WORKING CARD

Date 5-3-54Issued to Clarence DowdallAccount of Local 1281 Anchorage AlaskaNot Good After 30 DaysLocal No. 1046By James Adams
Business Representative
G.C. 31

NATIONAL LABOR RELATIONS BOARD

Docket No. 21-CB-548 etc OFFICIAL EXHIBIT NO. G.C. 31

Disposition { Identified ✓
Received ✓
Rejected ✓

In the matter of J. 1400 In Bro. of C. & J.
Date 12/13/54 Witness Dowdall Reporter Adm.

No. Pages

PROCEEDINGS

Trial Examiner Miller: The hearing will be in order.

CLARENCE A. DOWDALL

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

Q. (By Mr. Nicoson): You are the same Mr. Dowdall who was testifying at recess last night, are you not? A. Yes, sir.

Q. Mr. Dowdall, I believe in your direct testimony you said you were a member of the Carpenters Union, is that correct? A. Yes, sir.

Q. How long have you been a member of the Carpenter's Union?

A. I first joined the Carpenters Union in 1917. I was in for about two years, dropped out, rejoined in 1924, dropped out again in 1932, rejoined in 1934, not '34, '35. And I'm a good member, a member in good standing.

Q. Is it correct to state, Mr. Dowdall, that during this period of some 40 years, nearly 40 years that you have been a member of more than one local? A. Yes, sir, I have.

Q. Could you give us some estimate about how many locals that you have been a member in this period of time that you have related? [1012]

A. That would be a wild guess.

Q. I understand and I'm asking for it.

A. That is what I just hate to say.

(Testimony of Clarence A. Dowdall.)

Q. Just to the best you can recollect.

A. Oh, 25.

Q. 25. And is it also correct to say that in belonging to 25 or 30 locals without any attempt to be accurate about it——

A. Yes, that's right.

Q. ——that you have been located in 25 different places when those memberships were current, is that right?

A. That's right, that is probably correct, yes.

Q. And can you give us some idea as to the geographical extent to which those location covered, do you follow me?

A. Do you mean states?

Q. Yes, what states have you worked in?

A. Well, Kansas, Nebraska, Oklahoma, Texas, California, New Mexico, Washington, Alaska. That is all I can think of right now. There's others, I know, Colorado.

Q. And I suppose if it's correct to say—strike that.

Is it also correct to say that within this period of time you have had a considerable number of jobs?

A. That's right, yes, sir.

Q. In the construction industry?

A. That is true.

Q. As a carpenter? [1013]

A. As a carpenter, yes, and a superintendent.

Q. Would it be fair to say that those jobs would number in the hundreds?

A. Well, I could add it up and tell you exactly how many because I have a perfect record of all

(Testimony of Clarence A. Dowdall.)

the contractors I ever worked for since 1916 so it would be fifty or a hundred, yes, sir, we'll say a hundred.

Q. All right. We will settle for a hundred different jobs?

A. Yes, different government jobs, state jobs, all kinds of jobs, yes, sir.

Q. At least, you have worked or think you have work for approximately a hundred contractors of various types of jobs, would that be right?

A. Lots of these times I have contracted myself, you see, and been employed by individuals, not contractors.

Q. Yes. What I'm really trying to find out, Mr. Dowdall, is when you have worked for a contractor, not yourself, now, I understand, also—strike that.

Have you in this period of time and among those jobs which you have just recounted, occupied any supervisor's positions? A. Yes, sir.

Q. What supervisory positions have you had?

A. You mean for the different companies?

Q. Yes. [1014]

A. I have been superintendent for Austin Company, Morrison- Knudsen, I have Cooley Construction Company, I have J. A. Jones and Guy Atkins, Lumus Company.

Q. Luminus?

A. L-u-m-n-u-s. I think that is the proper way. They are out of New York.

Q. Without any attempt to be too exact about it, would you tell us when you occupied a supervi-

(Testimony of Clarence A. Dowdall.)

sory position for the Austin Company? You may do that by saying its five or ten years ago or whatever you recall it to be.

A. 1941, I'm pretty sure.

Q. Now, when did you occupy, approximately, when did you occupy a supervisory position for Knudsen—Morrison-Knudsen?

Trial Examiner: Before we go any further, Mr. Nicoson, I would like to ask, is the rank of a supervisory position of any materiality here?

Mr. Nicoson: Yes, I will come to that in just a moment. I think you will see the materiality or, at least, my purpose after a few questions.

Trial Examiner: As long as you are particularizing by companies, it would be just as well to particularize as to rank at the same time.

Mr. Nicoson: Yes, yes, for my purpose right now.

Q. (By Mr. Nicoson): Approximately when did you occupy a supervisory position? [1015]

A. Like I say, I have a list here, if you care to have it represented and give it to the court, I will gladly give it to the court and you can see who I worked for all these years.

Q. I'm not asking for such information exactly as you have suggested. I'm simply asking just your best approximation at the moment.

A. General foreman, Morrison-Knudsen Company in Inyokern Naval Base. That was '44, I believe. I can't possibly—

Q. I'm not trying to pin you down. Now, when

(Testimony of Clarence A. Dowdall.)

were you in a supervisory capacity with J. A. Jones?

A. J. A. Jones at Hanford, Washington, and Guy F. Atkins, they were combining a contracting job in, well, seems like '51, '50 or '51.

Q. And the Lumnus Company?

A. And I also went to San Antoine, Texas, with J. A. Jones in '51, I believe.

Trial Examiner: In a supervisory capacity?

The Witness: Yes, to San Antoine.

Q. (By Mr. Nicoson): And the——

A. The Lumnus Company, I worked there as a carpenter foreman, oh, maybe it was '41, I'm not sure.

Q. Now, while you occupied any of the supervisory positions within any of these companies which you have just named and during the time which you have approximated have you personally had anything to do with any hiring of any men?

A. On two or three jobs, yes, I did.

Q. When you were a carpenter foreman, did you have anything to do with the carpenters on that job? A. Yes.

Q. And as a superintendent, did you have general supervision over the hiring of men?

A. On some jobs, yes.

Q. Some jobs? A. Yes.

Q. Now, we have mentioned the Austin, the Morrison-Knudsen, J. A. Jones, Atkins Company and Lumnus Company? A. That's right.

Q. In any of these companies did you have anything to do with the employment of men?

(Testimony of Clarence A. Dowdall.)

A. Yes, on J. A. Jones job in San Antoine, I had full charge of hiring all carpenters.

Q. Maybe I'm confusing you and I'm very sorry.

A. That's right, you are.

Q. Let's run the list. In your supervisory capacity with Austin, did you have anything to do with the employment of men in any way, shape or form?

A. Our men for the Austin Company at Freeport, Texas, was all hired through the main office. I did not hire any of them.

Q. And after they were hired, were they brought and put under your supervision? [1017]

A. That's right.

Q. And I suppose you received some types of paper from the main office to show that they had been employed, is that right?

A. No, sir, not with the Austin Company.

Q. I see. Now, at the Austin Company, did you have supervision over anyone who was a carpenter?

A. I had supervision over all the carpenters, ironworkers and practically everyone on the job which was about five at night. I had charge of the night crew which was seventeen, eighteen hundred men. I had full charge of everyone working at night.

Q. And was this job at Freeport, Texas?

A. That's right.

Q. For the Austin Company?

A. For the Austin Company.

Q. And was it a union job?

(Testimony of Clarence A. Dowdall.)

A. It was a union job.

Q. That is, required union carpenters to work on the job, is that right? A. That is true.

Q. Now, in Morrison-Knudsen, did you have anything to do with the hiring of men while occupying the supervisory position that you have told us about?

A. No, sir, they were all hired through the office.

Q. That job, I believe you said, was in Inyokern? [1018] A. Inyokern, that's right.

Q. Was it a union job?

A. As far as I know, yes, it was.

Q. And do you know whether or not the carpenters on that job were members of any Carpenters Union? A. Yes.

Q. Is the same true with respect to the J. A. Jones and Atkins Company?

A. In Hanford, Washington, you have reference to?

Q. In Hanford, Washington.

A. I will have to state that I never saw any carpenter with his due book, union books or anything either on the Atkins job in Washington or at Inyokern. I never checked to see whether they belonged to the union or not.

Q. Did you have any conversation with your superiors with respect to whether or not union carpenters were a requirement on the job?

Mr. Heimann: Mr. Examiner, I object to the

(Testimony of Clarence A. Dowdall.)

question and unless the relevancy is brought out, I don't see it.

Trial Examiner: Objection overruled.

Q. (By Mr. Nicoson): Do you understand the question, Mr. Dowdall?

A. No, I have forgotten now. What was the question, please?

Q. The point is, I'm trying to develop from your testimony whether or not you knew that the carpenters on these various [1019] jobs were members of some carpenters union by some method or other?

A. Yes, as I have stated, I didn't. I couldn't swear that they were because I didn't see any union books, I didn't see any reports or anything that they did belong to the union, no, sir.

Q. Did you assume that they did?

A. I would say I presumed that they did, yes.

Q. So far as you know, all the carpenters on these various jobs were members of some carpenters union? A. As far as I know, yes.

Q. Now, Mr. Dowdall, irrespective of your supervisory capacity which you have just told us and in the odd hundred jobs which you have estimated for us, is it also a fact that you in obtaining and performing the service on these jobs, had occasion to transfer from one local union to another?

A. Yes, I have transferred from one local to another.

Q. And if your estimate was correct that you had belonged to approximately 25 locals, that

(Testimony of Clarence A. Dowdall.)

would indicate, would it not, that at some time or other, you had transferred from 25 locals, one to the other, you understand it, is that right?

A. No, I just don't follow unless you mean just——

Q. All right. Let me put it another way. Do you now recall how many different times in the period in which you told us about the approximate hundred jobs that you had occasion to [1020] change from one local union to another local union in order to get or to maintain the job? A. Yes.

Trial Examiner: Change membership are you speaking of?

Mr. Nicoson: I'm asking now for transfer. I will get to membership later on.

Trial Examiner: Very well. Do you recall?

The Witness: There's times when I have worked, if you have reference to this, there's times I lived and worked in Palm Springs and had my membership—or, we'll say that I have worked in Los Angeles and had my membership in Palm Springs and I have worked here and never transferred here, yes. Is that what you mean?

Q. (By Mr. Nicoson): Not, well, that is one of the things I mean. But, I'm asking you, Mr. Dowdall, having that type of thing in mind and in your experience as a carpenter among these approximate hundred jobs, how many times would you have occasion to do what you are talking about with respect to the Palm Springs local, if I make myself clear?

(Testimony of Clarence A. Dowdall.)

A. I just don't follow you exactly what you mean.

Q. All right. Mr. Dowdall, let's take it this way, is it a fact that if you are a member of one local union and you transferred or you get a job, let's put it that way, within the jurisdiction of another local union, that something must transpire so far as the union affairs are concerned between [1021] the local in which you hold your membership and the local in which you are now holding a job, is that right?

A. I don't always transfer when I work in, if I belong, say, this way, if my membership card is in Anchorage, Alaska, and I want to work in Palm Springs, I don't always transfer my membership to that local, no.

Q. All right, I understand that, but that isn't what I'm trying to develop with you now, Mr. Dowdall. I'm trying to now ask you as near as you can recall and, again, I state that I'm not trying to pin you down now to any degree of accuracy because I appreciate over a period of some 40 years it is pretty difficult to be accurate about all of these things, but you have had occasion, you have told me, where you have held membership in one local and worked within the jurisdiction of another local, is that right? A. Yes, sir.

Q. Now, can you tell me approximately how many times that type of a situation occurred in your experience, approximately?

(Testimony of Clarence A. Dowdall.)

A. No, I wouldn't attempt to try to tell you because I just haven't the least idea.

Q. None at all?

Trial Examiner: Well, the question, you mean that you are asking the witness whether it occurred on no occasions, is that the question?

Mr. Nicoson: I'm asking him how many times those types [1022] of situations have occurred in his experience as a carpenter in the last 40 years.

Trial Examiner: I'm at a loss to interpret the remark that stands on the record, "None at all." I don't know whether that is referring to the question as to whether he has no recollection at all or whether you are asking whether there were no occasions at all.

Mr. Nicoson: I will clear it up.

Q. (By Mr. Nicoson): There have been occasions, am I right in this, Mr. Dowdall, where you have had a membership in one local union and have worked within the jurisdiction of another local union? A. That is true, yes, sir.

Q. Now, bearing in mind that particular type of a situation, I am now asking you, as near as you can approximate or estimate how many times you have had occasion to hold membership in one local union while you were working in the jurisdiction of another local union, is that clear?

A. I remember one time I left my membership card in the State of Texas and worked all over the State of Kansas and Nebraska and part of Missouri but I don't know how many different local

(Testimony of Clarence A. Dowdall.)

territories that I was into but I left my membership book in the State of Texas and I worked in Kansas and Nebraska and Missouri.

Q. All right. Now, that is the type of situation I'm talking [1023] about. I want you to have that clearly in mind and see if you can give us just a rough approximation of when those things occurred within the 40 years of your experience.

A. You are asking for a whole lot that I just can't answer, man.

Q. You understand, Mr. Dowdall, I'm not trying to prove with exactness of number of times. I'm simply asking for you to give me your present recollection whatever it may be.

Mr. Heimann: I object. I don't think the question is clear as to the term how often or how many times. Does that mean how many, is it each time he worked in the different jurisdictions?

Mr. Nicoson: Just a minute.

Trial Examiner: I will overrule the objection and let the question stand.

Q. (By Mr. Nicoson): Would you answer the question?

A. Would you repeat it, please?

Mr. Nicoson: Would you kindly read the question?

(The question was read.)

Q. (By Mr. Nicoson): If it isn't clear, Mr. Dowdall, please say so.

A. I will try, yes. Well, I couldn't say because I don't know exactly where the jurisdiction of that

(Testimony of Clarence A. Dowdall.)

local, like in North Platte, Nebraska, I don't know how far the jurisdiction of that local, whether it taken in McCook, Nebraska, or not. [1024]

Q. Now, Mr. Dowdall, I think your having had membership in approximately 25 locals that you have stated know that the local in Texas didn't have jurisdiction over Nebraska, didn't you know that?

A. That had which?

Mr. Nicoson: Read the question to the witness, please.

(The question was read.)

The Witness: That's right, yes, didn't think they had, that's right.

Q. (By Mr. Nicoson): And you also knew that the Texas local didn't have jurisdiction in Missouri when you were up there, too, didn't you?

A. Yes, sir.

Q. And you knew that it didn't, the Texas local didn't have jurisdiction in Oklahoma?

A. Yes, sir.

Q. And those other states that you mentioned that you worked in while holding your book in Texas, you knew that, didn't you?

A. Yes, sir.

Q. All right. Now, will you try again as near as you can give us the number of times that you worked in the jurisdiction of the local in which you did not have your book deposited or have membership?

A. Well, that is a question I just don't see how I could possibly answer. [1025]

Trial Examiner: I think at this point Mr. Hei-

(Testimony of Clarence A. Dowdall.)

mann's original objection may have some validity and that if we explore the ambiguity that Mr. Heimann was trying to suggest, we may be able to get a clear record.

Mr. Nicoson: I'm perfectly satisfied with the record, myself.

Trial Examiner: I mean, as long as the witness indicates an inability to answer.

Mr. Nicoson: If he can't answer the question, it's a simple matter for him to say so and it's my job to frame one he can answer and if he can't, that is my fault. Now, he says he can't answer that question.. All right, that is the state of the record.

Trial Examiner: All right, if you want to, proceed.

The Witness: The only thing, I would like to have it clear in my mind so I'm not confused.

Q. (By Mr. Nicoson): You feel as if you are confused now, Mr. Dowdall?

A. In a way, yes.

Q. If you do, do you feel you did not understand what the question meant, is that right?

A. It's like, I'm trying to explain to him, he wants to know how many jurisdictions of Carpenters I have worked in when my book was in Texas. I simply don't know and I don't think anybody else knows. [1026]

Trial Examiner: Now, Mr. Nicoson is aware of what the source of your difficulty is.

Q. (By Mr. Nicoson): I'm sorry if you under-

(Testimony of Clarence A. Dowdall.)

stood that. I'm not confining my question, Mr. Dowdall, to the time that you had your book in Texas. My question goes to the entire 40 years of your experience during the period which you had membership as you have stated in approximately 25 different locals and I'm asking you over that period of 40 years. That is the basis for this question. Now, you have told us that you have had occasions in this period of your experience to hold membership in one local union and work in the jurisdiction of another local union. Am I right so far? A. Yes, sir.

Q. You have given us an example of when you had a membership in the Texas local and you worked in the States of Nebraska, Oklahoma, Missouri and Kansas, is that correct? A. Yes.

Q. Is that right? A. That's right.

Q. And you have also told us that you knew while working in the Nebraska, Missouri, Oklahoma and Kansas territories that you were working under jurisdictions of locals which was not the Texas local, isn't that right, at that time?

A. Well, that is kind of confusing to me because I understand the International, our International, that has jurisdiction [1027] over all unions any place in the United States because I belonged to the International every time I pay a dollar, pay my dues to the local in Los Angeles, a certain percentage of that due money goes to our International in Indianapolis and all these unions are controlled by that main office. So I don't see

(Testimony of Clarence A. Dowdall.)

if I belong in the State of Texas I don't work in California. I think, still, I still think that I'm in the jurisdiction of the Carpenters Union of the International because they all operate under the International.

Q. Now, I will ask you my question again that while you were holding your book in the Texas local—you understand what I mean when I say you have your book in the Texas local?

A. My membership was there.

Q. You knew while working in the State of Nebraska you were not under the jurisdiction of the Texas local, right? A. Yes.

Q. You also knew that while you were working in the State of Missouri you were not working under the jurisdiction of the Texas local, isn't that correct? A. That's right.

Q. The same is true with Kansas and Oklahoma? A. Yes.

Q. Now, the type of situation that I'm trying to draw to your mind is where you are holding membership in one local union like you held it in Texas—— [1028] A. That's right.

Q. ——and you are working under the jurisdiction of another local union like you did when you were working in Nebraska. Now did you have that picture in mind? A. Yes.

Q. You understand that type of situation, right?

A. Yes.

Q. Now, you have told us about working in Nebraska, Missouri, Kansas and Oklahoma. Now,

(Testimony of Clarence A. Dowdall.)

that is four instances where you have worked, where you have had your membership in one local and worked in the jurisdiction of another local, am I right so far? A. Yes.

Q. You have that picture in your mind, right?

A. Yes.

Q. All right. Now, in addition to those four times, have there been other times when you have held your book in one local and worked in the jurisdiction of another local, right?

A. Right now, I have my membership——

Q. Never mind that. Have there been such occasions? A. I would say yes.

Q. Now, what I simply want to know is your best recollection as of now how many such occasions have there been?

Trial Examiner: Within a period of 40 years.

Q. (By Mr. Nicoson): Within a period of 40 years. [1029]

A. Well, here's what I have in mind, if I'd say ten times you are liable to come back and ask me about all these ten times.

Q. I can promise you I have nothing like that in mind.

A. If I said 50 times, well, I can't say.

Trial Examiner: The pending question is as to your best recollection. We will deal with any other problem as it comes along.

The Witness: If I would just say several times, would that be a satisfactory answer?

(Testimony of Clarence A. Dowdall.)

Q. (By Mr. Nicoson): I will have to ask you what you understand several to be.

A. Well, there you are.

Q. And I want to promise you that if you give me a number, whatever it is, I will not pursue that particular type of question again. I'm leaving it solely up to you as to what your recollection of the moment is as to how many times that thing happened.

A. Well, that is like asking me if I went duck hunting 40 years ago and asking me how many ducks I killed.

Trial Examiner: You are unable to state?

The Witness: I couldn't place any definite number. Like ten, if I'd say ten, then, he might want to know where these places were. Well, I just don't know, or whether it was fifteen. [1030]

Trial Examiner: I realize Mr. Nicoson is a very able attorney and he knows what line he wants to pursue in cross examination. My object is to get a clear and understandable record. If there is any line that any counsel is pursuing that results in ambiguous or confused record, I want to clear that up regardless of where the chips may fall.

Q. (By Trial Examiner): You have testified to at least one set of instances of the type Mr. Nicoson is talking about occurring during a period when you held membership in the Texas local?

A. That's right.

Q. You also mentioned in passing earlier in your testimony in cross examination an occasion

(Testimony of Clarence A. Dowdall.)

of similar type of instance occurred when you held membership in Palm Spring local?

A. And worked in Los Angeles.

Q. And worked in Los Angeles. You also mentioned in passing an occasion when similar instances occurred at a time when you held membership in the Alaska local?

A. That's right, and now working in Palm Springs.

Q. Can you now recall any other instances in the same fashion?

A. Yes, I have left my membership in Palm Springs and I have worked in Los Angeles.

Q. Yes. On more than one occasion or are you merely repeating what we just went over?

A. No, all right, my membership card, book is now in [1031] Anchorage, Alaska, and I have worked in three different jobs in Los Angeles. So I have probably worked maybe a total of ten.

Q. Well, what I was after was this, can you recall any other instances, specific instances, when your membership book was resting in one local, or current in one local and you were working elsewhere? You mentioned the Texas instance, the Palm Springs instance and Alaska instance. Can you recall any other specific instances?

A. Yes, I left my book in Corpus Christi, Texas, and worked in San Antoine, worked in Austin, Texas. I left my book in Wichita Falls and worked in Burnett, Texas. So there has been a number that

(Testimony of Clarence A. Dowdall.)

I can't call right now, maybe a total of altogether, we will say, 15.

Mr. Nicoson: All right, thank you very much.

The Witness: I just don't want to confuse myself. I want everything plain to myself, I want to understand.

Trial Examiner: That is why I transferred the question from bare numbers to specific instances. Very well, let's go ahead.

Q. (By Mr. Nicoson): So we have now, at least, determined that about 15 times that these things have occurred? A. Yes, sir.

Q. Then, may I ask you, Mr. Dowdall, if it is correct to say that you have had some experience of what is required of you [1032] as a union member and to perform those requirements while working in a jurisdiction in which you did not have your book deposited, is that correct? A. Yes.

Q. Now, then, has there been in those times that you have mentioned or other that you recall when you have held a book in one local and worked in the jurisdiction of another local that you were required to take out a permit, you understand what a permit is? A. Yes.

* * * * *

The Witness: Yes, I understand what a permit is.

Q. (By Mr. Nicoson): Since you have indicated that you understand as to what a permit is, have there been occasions when you have taken out permits in a strange local?

(Testimony of Clarence A. Dowdall.)

A. Yes, there's, I have taken out permits, yes.

* * * * *

Q. (By Mr. Nicoson): Has there been occasion, Mr. Dowdall, where you have obtained a job in the jurisdiction of a local union other than that in which you had your book deposited?

A. Yes, there has been.

Q. Have there been any occasions under those circumstances when you have taken your book from the local in which it was deposited and placed it in the local in which you had just obtained the job or under the jurisdiction of which you had just obtained the job?

A. I just don't follow that question.

Mr. Nicoson: Read it once more.

Trial Examiner: Just a minute, Mr. Nicoson.

If I interpret the question correctly, Mr. Nicoson is now asking about an occasion or occasions in which you followed a different procedure than the permit procedure. We have already explored the situations in which you left your book in a local and went to the jurisdiction of another local and worked under permit or secured a permit.

The Witness: Yes.

Trial Examiner: Now, Mr. Nicoson is asking, have there been occasions when you followed a different procedure and [1034] having gone from your home local's area of jurisdiction to the area of jurisdiction of another local, instead of securing a permit, you took your book out of the home local and put it in the other local?

(Testimony of Clarence A. Dowdall.)

The Witness: Yes, sir, I think I testified 50 times.

Mr. Nicoson: At this hearing?

The Witness: Didn't I say I cleared in 50 locals outside of one and back in?

Trial Examiner: You said 25.

The Witness: 25, I beg your pardon. I will write the International one of these days and find out just exactly how many times and get a record.

* * * * *

Q. (By Mr. Nicoson): On those grounds—on those occasions which you have transferred from one local union by the device of taking your book out of one union and depositing it in another, were you required to pay any money into the union in [1035] which you deposited the book?

A. Well, to clear your book from one union into the other, no, you don't pay any money.

Q. It is simply stated in ordinary laymen's language, you take your book out of one local, you put it into another without any charges?

A. That's right.

Q. And that has happened, I think, you said something like 25 times without trying to be real exact?

A. That is true.

Q. And that happened when you transferred from the Palm Springs local to the Alaska local, didn't it?

A. That is true.

Q. So you are aware, are you not, that to work under the jurisdiction of a local in which your book is not deposited—strike that.

(Testimony of Clarence A. Dowdall.)

Are you aware, Mr. Dowdall, that in going into the jurisdiction of a so-called stranger local that you can obtain a job and work under the jurisdiction of that local without the deposit of any money, is that correct?

The Witness: Will you read that question to me, please?

(The question was read.)

The Witness: Do you understand him on that question?

Trial Examiner: Yes, I do.

The Witness: All right, explain it to me. [1036]

Trial Examiner: As I interpret the question, Mr. Nicoson is trying to elicit the statement from you as to whether on the basis of your experience with these two types of procedure——

The Witness: Yes.

Trial Examiner: ——on working outside the jurisdiction of a home local, on the basis of your experience with the two types of procedure, are you aware that there is available to you a procedure whereby, in going outside the jurisdiction of an old home local into the jurisdiction of another local, you can establish relationship with the new local without paying money.

The Witness: The only way I'm aware of the fact is, I go out and ask a contractor if I can go to work for him and if the contractor says yes, I go to work.

Trial Examiner: Just a minute. We are not speaking now of the problem of employment. We

(Testimony of Clarence A. Dowdall.)

are speaking entirely about the problem of relationship of one local union to another. There's been testimony here and you have testified with respect to two types of bookkeeping procedure that you may have in the situation that we are generally discussing. One, I may describe as the permit procedure and the other, the deposit procedure, or book deposit procedure. Now, on the basis of your experience with these two kinds of procedures involving only you and the union, have you become aware by [1037] virtue of your experience that there is available a type of procedure by which you can establish some sort of connection with a new local without paying money in connection with the process of establishing that new relationship?

The Witness: Well, I'm sorry I'm so dumb I can't understand. I can not see what the man is trying to explain, trying to get through to me.

Trial Examiner: I think our record is sufficiently clear. I will draw any necessary inferences.

The Witness: No, I'm just honest with you. I'd like, just like to have him explain it in this way: I know I can have a book deposited in Palm Springs and come over here and work in Los Angeles if the contractor don't tell me I have to get a permit.

Q. By Mr. Nicoson): Let's put it this way, Mr. Dowdall, you know you can go to Palm Springs and deposit your book from the Alaska local without paying any money? A. Yes.

Q. And that entitles you to all the rights and privileges under the Palm Springs local?

(Testimony of Clarence A. Dowdall.)

A. That's right.

Q. And it doesn't cost you a nickel?

A. Not any more dues, no.

Q. That's right. Of course you have to pay your dues wherever you have your book, you still have to pay your monthly dues? [1038]

A. That's right.

Q. So that you know that you can go into the jurisdiction of a local, establish a relationship with that local by the simple process of depositing your book without the payment of money?

A. Yes, I can go there and go to work and deposit my book.

Q. Thereafter, the local will take care of you as best it can, or, at least, attempt to or go through the motions? A. All right, yes.

Q. All right. You also knew that, did you not, at the time you had your conversation with Mr. Lancaster down at the Pacific Palisades about that Pardee job? A. Yes, sir.

Q. You knew that at the time you went down to talk to Mr. Savage, didn't you?

A. Now, you want to know if I knew that I had to pay any money when I went down to talk to Mr. Savage?

Trial Examiner: The question is were you aware of the book deposit procedure?

The Witness: Yes, I was, that's right.

Q. (By Mr. Nicoson): You were aware that you could deposit your book if you wanted to with 1400 without having to pay a nickel?

(Testimony of Clarence A. Dowdall.)

A. That's right.

Q. And you were also aware of that fact when you went down [1039] to the District Council office, weren't you? A. Yes.

Q. And asked for a permit?

A. That is the way the union operates, yes.

Q. And you knew at the time if you had deposited your book with Local 1400, it would not have been necessary for you to go to the District Council to take out a book, you knew that, too, didn't you?

A. Yes.

Q. Now, do you recall the last day you worked in Alaska?

A. Yes, I remember the last day I worked in Alaska.

Q. Can you give us the date?

A. October 9, I believe is the day.

Q. 1953? A. That's right.

Q. And I believe the record will show that you had a hearing before a Trial Examiner of the National Labor Relations Board in the early part of November of 1953, is that right?

A. I believe it was the 10th of November, wasn't it?

Q. 10th, all right. And, now, after the 10th of November did you leave Alaska?

A. No, I didn't leave Alaska, not right away.

Q. Did you at any time leave Alaska?

A. Yes, I did, later.

Q. When did you leave Alaska, having the date of November [1040] 10th in mind?

(Testimony of Clarence A. Dowdall.)

A. I received a message from my wife that I had a sick child here in the hospital in Los Angeles on the 20th of November, I believe.

Q. All right, and now is that the way you fix in mind the date when you left Alaska?

A. November the 20th.

Q. All right. A. I'm pretty sure.

Q. Then you came directly to Los Angeles?

A. Yes, I flew.

Q. By plane? A. That's right.

Q. And you arrived in Los Angeles on the 21st?

A. Yes.

Q. On the 21st?

A. That is when it was, on the 21st.

Q. November 21st? A. That's right. [1041]

* * * * *

Trial Examiner: Now, on the basis of that acquired knowledge with respect to the procedure, the immediately pending question is, do you have any knowledge at all as to whether it was possible in practice and under the rules of the union to have the necessary clearances arranged and made a matter of record after the actual deposit of your book in a new local, in other words, what is your knowledge with respect to the [1075] practice and procedure of your union on the basis of 40 years experience that you have to have the clearance of the old local first before you actually turn over the book to the new local or that the necessary authorization or approval of the old local can be secured afterwards?

(Testimony of Clarence A. Dowdall.)

The Witness: That is left up entirely to me. If I, the International leaves that up entirely to me. If I want to leave my book in Anchorage and work here in Los Angeles, I have that permission, the International gives me that permission. I do not have to transfer from one local to another and I do not have to deposit my book in this local. I can leave it in the International and work there the rest of my life if I want to. The International grants me that permission.

Trial Examiner: Now, the immediate problem—as long we are exploring it, I'd like to get it clear on the record. The immediate problem is this, I assume on the basis of the general tenor of the testimony up to now that if you could have decided in your own judgment that you were going to clear out of the Alaska local and establish a relationship as a dues paying member with some local in Southern California, if you had formed that intention before you left Alaska, you could on your own initiative have gone to the proper official of the Alaska local and secured the necessary signature or stamp or whatever it was indicating the Alaska local's consent to such [1076] a move?

The Witness: That's right.

Trial Examiner: Now, let's assume that it also possible that, you say it being left entirely up to you, it is also possible you could have left Alaska with the intention of staying a dues paying member of the Alaska local and change your mind upon arriving in the work jurisdiction of another local.

(Testimony of Clarence A. Dowdall.)

Let's assume that if you had arrived in Texas or Kansas or Missouri or California and decided upon arriving there that you wanted to become a dues paying member of the local in this new territory, you could have made that decision on your own initiative had you wanted to do so?

The Witness: That's right. [1077]

* * * * *

Q. (By Mr. Nicoson): You also know, do you not, Mr. Dowdall, that, assuming the facts which the Trial Examiner has put to you, that after having come down here from Alaska and having decided, say, for example, that you wanted to go to work within the jurisdiction of 1400, that you could state [1078] your desire to deposit that book, go to work within the jurisdiction of Local 1400 while the necessary machinery was being employed to effect the transfer of your membership from Alaska?

A. Yes, sir, I could do that, yes, sir.

Q. Without the payment of any money?

A. Well, that is something——

Q. Unless it was dues?

A. That is something else. Some locals will let you come in and you can work for months and months and never pay extra dues other than the ones I paid in Alaska. I can go to possibly Palm Springs where I'm working right now and I can go in different locations where they don't demand extra dues from you and some unions do.

Q. (By Trial Examiner): With relation to the problem of extra dues, that is not the aspect of the

(Testimony of Clarence A. Dowdall.)

matter. You have indicated in your prior testimony that your dues in the Alaska Local 1281 were paid up through March of 1954? A. Yes, sir.

Q. Now, having relations specifically to your last answer, let me ask this, have you ever had occasion in establishing relationship with any new local by book deposit, have you ever had occasion in which upon depositing your book, the book showed that dues for the current month or months ahead were already paid up in the old local? [1079]

A. Yes.

Q. That has happened?

A. Yes. And then, you see, if I'm paid up, like if I wanted to—I want to explain this—

Q. I'm asking you for the testimony on your knowledge of the present national unions.

A. If I had been paid up through March, I came down here and wanted to get here in this union in December, I give them my book with the clearance in. Then if my dues are paid up this union writes the union back in Alaska and the union forwards my dues down to Local 1400.

Q. Under this practice which I understand you say the union does follow, under that practice, you would not be required to pay into an organization down here dues covering the same months?

A. That's right.

Q. Very well.

A. That is the way some locals operate. They may make me pay extra dues than I paid in Alaska, some unions make me pay extra dues to work here.

(Testimony of Clarence A. Dowdall.)

Other locations do not, other unions do not. [1080]

* * * * *

Q. (By Mr. Nicoson): Isn't it so in the language of the union and its members that such a fee as the permit fee is termed foreign dues, isn't that right? A. That is foreign dues?

Q. That is foreign dues?

A. Permit special assessment, I call it.

Q. Whatever you call it, that is the term commonly applied to it, that is, foreign dues when you are working in a foreign jurisdiction?

A. That's right, yes. [1081] * * * * *

Q. (By Mr. Nicoson): Let me ask, Mr. Dowdall, another question along this line. Outside of personal motives, Mr. Dowdall, do you know of any rule of the union which would have prohibited you from depositing your book with Local 1400 at the time you met Mr. Savage?

A. No, there was no rule. I could have deposited it if I had cared to.

Q. And thereafter, completing the job, or deciding that you wanted to move out of that jurisdiction to redeposit it, the book, back in 1281 in Alaska, there is nothing that would prohibit that, is there?

A. No, I can transfer to any union in the United States if there's not a strike going. [1082]

* * * * *

(The documents heretofore marked Respondents' Exhibit Nos. 9 and 10 for identification were received in evidence.) [1163] * * * * *

RESPONDENTS' EXHIBIT No. 9-A

[Letterhead of United Brotherhood of Carpenters
and Joiners of America]

Local Union No. 1400
2439 Santa Monica Boulevard
Santa Monica, California

April 9, 1954

Registered—Return Receipt Requested

Mr. Clarence A. Dowdall

c/o Irwin Emerson

3826 Olmstead Avenue

Los Angeles, California

Dear Sir:

This is to inform you that the undersigned labor organization does not now have and never has had any objection to your employment by any of the employers named below as receiving copies hereof, or any other employers.

Insofar as this labor organization is concerned your employment by any of the employers named below as receiving copies hereof may be consummated without any permission, permit, referral or any document, act, or leave, express or implied, of or by this labor organization whatsoever.

Yours very truly,

Local Union No. 1400, United Brotherhood of Carpenters and Joiners of America,

/s/ By Robert O'Hare,
Business Representative

cc - Pardee Construction Co., 10639 Santa Monica Blvd., L. A. 25

Pardee Construction #1, 10639 Santa Monica Blvd., L. A. 25

Pardee Construction #2, 10639 Santa Monica Blvd., L. A. 25

Pardee-Phillips Co., 10639 Santa Monica Blvd., L. A. 25

Pardee-Phillips Building Co., 10639 Santa Monica Blvd., L. A. 25

Pardee-Phillips of Las Vegas, Las Vegas, Nev.

Los Angeles Building & Construction Trades Council

Building Contractors Association of California
Howard F. LeBaron, Regional Director, 21st
Region, 111 W. 7th, L. A.

RESPONDENTS' EXHIBIT No. 10-A

[Letterhead of Los Angeles County District
Council of Carpenters]
2200 West 7th Street
Los Angeles 5, Calif.

April 8, 1954

Mr. Clarence A. Dowdall
c/o Irwin Emerson
3826 Olmstead Avenue
Los Angeles, California
Dear Sir:

This is to inform you that the undersigned labor organization does not now have and never has had any objection to your employment by any of the

employers named below as receiving copies hereof, or any other employers.

Insofar as this labor organization is concerned your employment by any of the employers named below as receiving copies hereof may be consummated without any permission, permit, referral or any document, act, or leave, express or implied, of or by this labor organization.

Yours very truly,

Los Angeles County District Council
of Carpenters,

/s/ By Earl E. Thomas,
Secretary

eet;k

cc - Pardee Construction Co., 10639 Santa Monica
Blvd., L. A. 25

Pardee Construction Co., #1, 10639 Santa
Monica Blvd., L. A. 25

Pardee Construction Co., #2, 10639 Santa
Monica Blvd., L. A. 25

Pardee-Phillips Co., 10639 Santa Monica Blvd.,
L. A. 25

Pardee-Phillips Building Co., 10639 Santa
Monica Blvd., L. A. 25

Pardee-Phillips of Las Vegas, Las Vegas,
Nevada

Los Angeles Building & Construction Trades
Council

Building Contractors Association of California
Howard F. LeBaron, Regional Director, 21st
Region, 111 W. 7th St., L. A.

Registered—Return Receipt Requested

* * * * *

(Testimony of Clarence A. Dowdall.)

Q. Now, I'm going to ask you a question, Mr. Dowdall, and I'm going to tell you that I'm asking this question for the purpose of impeachment. I'm going to ask you now if it is not [1181] a fact that at that time and place in the presence of Mr. James Adams, Mr. T. A. Morris and Mr. Leo Cruse that you stated that you were not looking for work, is that or is that not a fact?

A. That is absolutely untrue.

Q. I'm going to ask you a further question for the same purpose.

Is is not a fact that at that time and place before Mr. James Adams, before Mr. T. A. Morris and before Leo Cruse that you stated that the only reason that you wanted this permit was so that you could qualify to obtain your unemployment compensation?

A. I told Mr. James Adams, Mr. James Adams said to me first, he said, "Mr. Dowdall, you can't go to work here." He says, "I'm not going to issue a permit to you to go to work on."

I said, Mr. James Adams, I did not ask you for a permit to go to work on. I merely asked you for a number and a permit so as I could go to Indio and sign up for my unemployment insurance."

* * * * *

The Witness: After I pointed that article out to Mr. James Adams, he said, "Well, Mr. Dowdall," he says, "you are entitled to draw your unemployment compensation so," he says, "I'm going to break the rules and," he says, "I'm going to write

(Testimony of Clarence A. Dowdall.)
you a permit but," he says, "I'm telling you now, you can not go to work on this permit."

I said, "Mr. Adams, I didn't ask you, I'm not asking you for a job. I'm not asking to go to work, I'm just asking you [1188] plainly for a number so I can sign up and draw my unemployment. As far as me getting my jobs," I says, "I'll take care of that."

Mr. Nicoson: If your Honor please, so that the record may be complete and in order to avoid depriving Mr. Dowdall of the dues book which has been marked for identification as Respondents' Exhibit 5, I'm going to ask permission to read into the record Section 46 which is printed in the back of the book and, in order to avoid the necessity of physically and actually reading it, I will ask permission to have the reporter copy it as if it had been read.

Mr. Heimann: I have no objection.

Trial Examiner: The portion entitled "Clearance Cards." There being no objection, the permission is granted and the reporter is so instructed.

"Clearance Cards

"A. Section 46. A member who desires to leave the jurisdiction of his local union or District Council to work in another jurisdiction must surrender his working card and present his dues book to the financial secretary, who shall then fill out his clearance card and affix seal thereto. It shall be compulsory, except in case of strike or lock-out, for the local union to issue said card, providing the member has no charges pending against him and [1189]

(Testimony of Clarence A. Dowdall.)

pays all arrearages, together with current month's dues. Said clearance card shall expire one month from date of issue. It shall be optional with a local union or District Council to issue clearance cards in a jurisdiction where a strike or lock-out is in effect. A member may leave such jurisdiction without a clearance card to seek work in another jurisdiction where no strike or lock-out exists, provided he presents a statement over the seal of the local union or District Council in which he holds membership, showing that a strike or lock-out is in effect in said jurisdiction. He shall pay the prevailing charge for a working permit in the jurisdiction where he goes to work.

“B. It is compulsory for the member to report and deposit his clearance card at the office of the District Council, or local union where no District Council exists, before seeking work, pending a meeting of the local union, and comply with all local laws. And in no case shall the financial secretary accept dues other than to secure clearance card from a member working in the jurisdiction of any other local union or District Council, without the consent of such local union or District Council. It shall be the duty of the financial secretary [1190] accepting dues from a member for clearance card who is working in another jurisdiction to immediately report same to the District Council or local union where no District Council exists under penalty of a fine of Five Dollars (\$5.00) for the first offense, Ten Dollars (\$10.00) for the second offense,

(Testimony of Clarence A. Dowdall.)

and for the third offense suspension from all local office for a period of two (2) years.

“C. A member who desires to work in another jurisdiction from which he would return home daily, or who does not desire to transfer his membership, shall, before going to work, secure a working permit in writing from the local union or District Council in whose jurisdiction he may go to work. He shall pay for such working permit a charge of not less than seventy-five cents (75c) per month, nor more than the monthly dues of the local union or District Council, and if less than two years a member he shall pay any difference in initiation fee, and shall be subject to all local assessments levied exclusively for direct trade purposes by and for the use of the local union or District Council.

“D. No local union shall have the right to collect dues again for the month paid on a clearance card. The local union issuing the card shall pay [1191] to the general secretary the tax for said member for the month only in which the card is issued, and he shall be considered a member of that local union until he deposits his card, when he becomes a member of the local union wherein said card has been deposited.

“E. Any general officer, while employed by the United Brotherhood, shall not be required to take a clearance card from the local union of which he is a member at the time of his election or appointment.

“F. A member of a local union taking out a

(Testimony of Clarence A. Dowdall.)

clearance card before he is two years a member shall pay, where the initiation fee is higher into the local union accepting the clearance card, a sum equal to the difference in initiation fee before the clearance card can be accepted.

“G. On entering a local union a member with a clearance card shall present his dues book to the president, who shall appoint a committee of three to examine the applicant and his dues book and report at once. If the clearance card and dues book are found correct, and the identity of the member established to whom the clearance card was granted, he shall be admitted to the local union as a member [1192] thereof, provided there is no strike or lock-out in effect in that district.

“H. On deposit of said card the financial secretary receiving it must sign and affix the seal to the coupon and forward coupon to the general secretary at the close of the meeting as evidence of its deposit. The local issuing the clearance card shall refund to the member all dues in excess of the current month. The financial secretary receiving the clearance card shall immediately report the same to the financial secretary issuing the clearance card under penalty of Five (\$5.00) Dollars fine.

“I. A member who redeposits his clearance card must present his dues book to the president, who shall require a record of same be made with the recording secretary, and the financial secretary shall report the return of said clearance card to the general secretary at the close of the meeting.” [1193]

* * * * *

CHARLOTTE G. BLAKE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Heimann): Would you state your name and address, [1210] please?

A. Charlotte G. Blake, B-l-a-k-e. 1700 South El Molino Street, Alhambra.

Q. What is your occupation, Mrs. Blake?

A. I'm office manager for Oltmans Construction Company.

Q. Would you give us the address of that company?

A. 1560 West Monterey Pass Road, Monterey Park.

* * * * *

Q. (By Mr. Heimann): Do you know whether the Oltmans Construction Company is a member of the Building Contractors of America?

A. Yes, they are a member.

* * * * *

Q. (By Mr. Heimann): Would you tell us on what your knowledge is based, Mrs. Blake?

A. That they are members of the Association?

Q. How did you find out, if you did?

A. I know that we are members of the Association because I pay the dues for such membership. [1211]

* * * * *

Q. (By Mr. Heimann): Mrs. Blake, will you

(Testimony of Charlotte G. Blake.)

tell us what [1212] your function is as office manager for Oltmans Construction Company?

A. Well, I'm the office manager and also directly in charge, head of the accounting department and, as such, I'm the head bookkeeper and supervise all the work in connection with this accounting.

Q. In your position do you receive knowledge of the work that is performed by Oltmans Construction Company?

A. Direct advice, yes, every job—well, I don't have to say. Do you want me to qualify the statement?

Trial Examiner: Yes.

The Witness: Every job that is started crosses my desk for my direct information so that I can record it and keep track of it until it is off the books, finally paid and off the books.

Q. (By Mr. Heimann): By the way, how long have you been office manager of Oltmans Construction Company? A. Over three years.

Q. Have you in the way in which you just described obtained any knowledge whether Oltmans Construction Company has performed any work for any rubber companies?

A. Yes, sir. [1213]

* * * * *

Q. (By Mr. Heimann): I see. Will you tell us what information you have received as to that?

A. Well, any and all jobs, no matter what is involved, whether small or large, a master sales order is issued.

(Testimony of Charlotte G. Blake.)

Q. Maybe you misunderstood my question, Mrs. Blake. What I'm after now is the actual information that you have received as to the jobs for whom Oltmans Construction, in other words, for what rubber companies has Oltmans Construction performed service?

A. You want to know what rubber companies, oh, yes. We have done work for many years for Firestone Tire & Rubber Company and we have done work for the B. F. Goodrich Company, Los Angeles plant. We have done work for U. S. Rubber and we [1214] have done a small volume of work for the Goodyear Tire & Rubber Company. Goodness, that is all I can recollect right now just offhand. [1215]

* * * * *

Q. (By Mr. Heimann): Now, have you—let me ask you this, first, independent of looking up any records, do you have any knowledge of the jobs performed for Goodrich, B. F. Goodrich Company in 1952 and 1953? A. Yes.

Q. In addition to that, did you refresh your recollection in any way? A. Yes, I did.

Q. How did you refresh your recollection?

A. I totaled these completed job ledger sheets and ran a tape on the work that was performed in 1953 and on the work performed in 1952. Then I ran the totals on all the work.

Q. Were these job ledger sheets prepared by you or under your supervision?

A. Yes, prepared under my supervision.

(Testimony of Charlotte G. Blake.)

Q. Did you prepare the tape yourself?

A. Yes, I did.

Q. You have the tape with you?

A. Yes, I do. [1217]

* * * * *

Q. (By Mr. Heimann): Mrs. Blake, then we go back to the point. Do you have any figure on that tape that you prepared, do you have any figure on that tape that you prepared that [1218] represents the amount involved in the job or jobs performed by Oltmans Construction Company for B. F. Goodrich Company in 1952 and 1953?

A. I have. [1219]

* * * * *

Q. (By Mr. Heimann): Now, Mrs. Blake, do you remember what the question was? [1220]

A. Yes, you wanted to know the amount of mon-
eys received for the construction work performed
for the B. F. Goodrich Company in 1952 and 1953.

Q. That is correct.

A. Yes, the figure is \$958,412.49.

* * * * *

Q. (By Mr. Heimann): Can you tell us how much of that work was performed in 1953 and what the amount involved was?

* * * * *

The Witness: Yes.

Q. (By Mr. Heimann): Tell us what that amount was?

* * * * *

The Witness: \$745,869.17. [1221]

(Testimony of Charlotte G. Blake.)

Q. (By Mr. Heimann): Now, can you tell us what that work that was performed by Oltmans Construction for B. F. Goodrich Company consisted of?

A. It consisted of additions to their Los Angeles tire plant and, also, alteration work within the plant. * * * * * [1222]

Mr. Nicoson: I now move to strike the entire testimony of this witness first, on the grounds that no proper foundation having been laid for it, that it is not the best evidence, that the witness' testimony shows that there are books and records which she has not brought with her from which the information can be readily obtainable. No effort has been made by the General Counsel to obtain those books and bring them before this tribunal. Further, on the grounds that the testimony of the witness is hearsay as to these respondents and, finally, that her testimony is entirely immaterial, irrelevant and incompetent.

Trial Examiner: Do you have anything to say, Mr. Heimann?

Mr. Heimann: I resist Mr. Nicoson's motion for obvious reasons. As far as I can see, the only thing that might have to be answered is the contention that it's not the best evidence. I have not asked Mrs. Blake, of course, for contents of her records. The contents of her records are the best evidence of what is in the records. I asked her as to the business performed. That can be proven either by the records or by her recollection or by her recollection

as refreshed by the records. Possibly by other means. [1230]

Mr. Nicoson: I would be pleased if he cited some authority on that.

Mr. Heimann: None of the methods are any better than the other. None of these methods come within the context of the best evidence rule which deals merely, although it is very, very often misunderstood, which deals merely with the contents of written documents.

Trial Examiner: Motion to strike denied. [1231]
* * * * *

CLARENCE A. DOWDALL

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued) [1233]
* * * * *

Trial Examiner: The hearing will be in order.

I have some questions that have occurred to me during the examination of Mr. Dowdall which I would like to interpose at this time prior to any possible redirect examination. [1246]
* * * * *

Q. I see. Now, since you have indicated by your testimony that you have on one occasion or another in your 40 years of experience in the trade used both procedures, the deposit procedure and the temporary working card procedure——

A. Yes.

Q. ——when working in the trade jurisdiction

(Testimony of Clarence A. Dowdall.)

and area jurisdiction of a foreign local, I will ask you this: On the basis of your experience, what elements of a work situation would influence a decision as to whether to follow the one procedure or the other when going into the territory of a foreign local?

A. Well, the reason why I like to leave my membership book in one local, you see, in my home local, like I live in Anchorage, I like to have my membership book in there because we have rules, the union has rules, I must be a member of that union for 12 months or one year before I'm entitled to hold an office in the union or before I'm entitled to vote to elect any officer like a business agent or a financial secretary. See, I can not vote for them for any offices, I have no vote and it's the same way, I do not have any vote when it comes to voting on wage scale. I do not have any [1255] voice as far as voting power. I have to be there a year so if a person's going to have his home, I would like to rather leave my book in my home town where I'm going to live. That way I have a chance to vote for my officers. Where if I clear in and out now, I don't never have a vote on a wage scale or anything, understand.

Q. Would there be any other reason that might influence that decision as to whether to follow the working permit procedure or the book deposit procedure?

A. No, not, only lots of time, I decide on leaving the job on a Friday night, on Friday, see, the Labor

(Testimony of Clarence A. Dowdall.)

Temple is closed all day Saturday and Sunday and I may fly from one place to another, 600, 700 miles by Monday to go to work. Lots of times I leave my book there and then I take this, pay these permits or dues which—and I don't never go down and offer to pay the dues, I go out and go to work. If the man demands it, I pay it. I pay it but I don't volunteer it.

Q. Now, if I interpret the general line of testimony correctly, if a worker such as yourself is working on a temporary working card, the practical effect of that, if I understand correctly, is that you continue to pay your regular monthly dues to the home local in which your book is deposited?

A. Yes.

Q. And you pay any fee which the foreign local may charge [1256] if it charges any fee at all?

A. Yes, that is what it says.

Q. For a temporary working card in the new jurisdiction?

A. Yes.

Q. And I believe Mr. Nicoson at one point earlier mentioned that the amounts that you paid to the foreign local for the temporary working card are customarily referred to in the trade as foreign dues?

A. That's right, foreign dues. See, that foreign dues that I pay in the local, none of that goes to the International at all. The local District Council keeps all that. Where I pay my dues in the other local where I have my book, a certain per cent of that goes to our International. [1257]

* * * * *

C. B. ZINK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Heimann): State your name and address please, Mr. Zink.

A. C. B. Zink, Z-i-n-k, B. F. Goodrich Company, 5400 East Olympic Boulevard, Los Angeles.

* * * * *

Q. What is your position with B. F. Goodrich Company?

A. I'm manager of the collection distribution control, Pacific Coast which includes 11 western states.

Q. And would you describe for us in brief your function as manager of production and distribution control for the Pacific Coast?

A. Fundamental functions and prefatory functions are obtaining requirements of our divisional sales departments, [1258] amalgamating those requirements into one production schedule, as far as production is concerned. After production attainment, requirements then are made to the 11 western states based upon customary requirements and service. I might add this, this may include some points beyond the 11 western states which also includes the Far East as well as the territory of Hawaii. * * * * *

Q. Does the B. F. Goodrich Rubber Company have a plant in Los Angeles?

(Testimony of C. B. Zink.)

A. Located at 5400 East Olympic Boulevard.

* * * * *

Q. (By Mr. Heimann): Does the Los Angeles plant of B. F. Goodrich Company make any shipments of goods or products?

A. They make all shipments. [1259]

Q. Do you have anything to do——

A. Wait a minute, just a minute. Correct that. They do not make the shipments themselves. They go by common carrier contract, truck, but we actually ship out of that plant.

Q. I understand. Do you have anything to do with such shipments?

A. All orders for any shipments leaving that plant clear through my responsibility as well as all orders to be shipped first originate in my department coming from the 11 western states or east of the Rocky Mountain area.

Trial Examiner: Mr. Zink, how long have you exercised the general responsibilities that you have outlined previously and specific responsibilities that you have indicated in response to the last question?

The Witness: 17 years in Los Angeles.

Trial Examiner: Very well.

Mr. Heimann: That was going to be my next question.

The Witness: 26 years with the company.

Q. (By Mr. Heimann): Now, calling your attention specifically to the year, to the calendar year 1953, have any such shipments been made from the Los Angeles plant to points outside the State of

(Testimony of C. B. Zink.)

California? A. Oh, decidedly. [1260]

* * * * *

Q. (By Mr. Heimann): On what basis have you obtained this knowledge?

A. Matter of records.

* * * * *

Q. (By Mr. Heimann): Are those records kept by you or by employees under your supervision?

A. They are kept under lock and key in the vault by employees under my supervision. [1261]

Q. I see. And do you direct these employees as to the keeping of these records? A. I do.

* * * * *

Q. (By Mr. Heimann): Mr. Zink, has the B. F. Goodrich Company Los Angeles plant made any shipments to points outside the State of California during the calendar year of 1953? [1262]

* * * * *

A. The question, what kind of material?

Q. Any goods or products manufactured by the Los Angeles plant of B. F. Goodrich Company.

A. Yes, sir.

Q. Would you tell us to what states and other geographical areas outside of the State of California such goods and products were shipped?

* * * * *

The Witness: The State of Washington, Oregon, Idaho, Montana, Wyoming, Colorado, New Mexico, Texas, Arizona, Territory of Hawaii, Manila, Philippine Islands, Ohio, Pennsylvania, Alabama, Louisiana, Mississippi and Iowa.

(Testimony of C. B. Zink.)

Q. (By Mr. Heimann): In your official capacity does the value of such shipments come to your knowledge?

A. As I transpose them from units to dollar figures.

Q. Would you tell us the value involved in such shipments [1263] to areas that you indicated in 1953? [1264]

* * * * *

The Witness: May I use a pencil a minute? You are asking for a dollar figure. I have to figure that.

I'm going to have to state that, after all, I'm obligated not to divulge corporation figures.

Trial Examiner: You are at liberty to say in excess of certain figures if you wish.

The Witness: Outside the State of California?

Q. (By Mr. Heimann): That's right, sir.

A. It's in excess of \$5,000,000.00.

Q. Now, you stated that that is an approximation. Is it possible in your mind that it would be less than \$4,000,000.00?

A. No, not less than \$4,000,000.00 [1265]

* * * * *

Mr. Nicoson: I make a stipulation the plant of B. F. Goodrich Company separate and apart of any other consideration in Los Angeles, Los Angeles County, is engaged in international commerce within the meaning of the Labor Relations Act in cases decided thereunder. What else do you want?

(Testimony of C. B. Zink.)

Mr. Heimann: Thanks for the stipulation. I would like to proceed.

Mr. Nicoson: Do you join it?

Mr. Heimann: Yes, I join in it. [1267]

* * * * *

Q. (By Mr. Heimann): Do you have any objection to telling us what the general lines of merchandise are that the B. F. Goodrich plant in Los Angeles manufactures?

A. I do. I'm under bond and, also, with the United States Air Force.

Q. You mean it's a secret?

* * * * *

The Witness: I can tell you some things, tires, tubes, tank lines, cement and camelback. [1269]

* * * * *

CLARENCE A. DOWDALL

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

Redirect Examination [1270]

* * * * *

Q. (By Mr. Heimann): At the time, on January 7, when Mr. Adams issued you a permit or temporary working card, did he ask you for any payment?

A. Yes, he asked me for \$5.00 which I gave him. [1282]

* * * * *

Q. Well, you testified that Mr. Adams told you that before you could do something you had to take

(Testimony of Clarence A. Dowdall.)

out a dues book or pay for a permit. What was that, what was it that you could not do before you had taken out a dues book or paid for a permit that Mr. Adams told you?

A. Just what day are you referring to, the 1st and 7th?

Q. Yes, I believe your testimony regarding that incident related to January 7.

A. Mr. Adams told me that he would not and had been instructed from the union not to issue any temporary working cards. That I must clear in before he could issue me one. That is when I brought up the big argument about showing him in this book that I, that the International granted me that permission and I explained to him then, I said, "Mr. Adams," I said, "I think you're being very unfair to me, that I have a home here in Palm Springs and a family, pay taxes and vote, [1283] that you do not want to grant me a permit without clearing in."

Q. And you at that time talked with Mr. Adams about your going to work?

A. I told Mr. Adams, yes, that I was going to work that I was looking for a job and I—I believe that is——

Q. Have you completed your answer?

A. Yes, I have.

Q. Did Mr. Adams say whether you had to do anything before you could go to work?

A. Mr. Adams told me that I had to deposit my

(Testimony of Clarence A. Dowdall.)

clearance card or my membership book into that local before I could go to work.

Q. Now, during your testimony you have used the expression "depositing book" many times. That term involves the physical deposit of your dues book with the local? A. Yes, it's your membership.

Q. Does that—

A. But I can always keep that book after they tear this little clearance card out. I always demand and they always give the book back to me and I carry it around. Lots of the boys leave them with the union but I found out a long time ago in my 40 years experience it does not pay to leave your book with the union. The best thing to do is carry it in your pocket.

Q. Would you tell us the reason, if any, why you chose not [1284] to deposit your book with the Palm Springs local in January of 1954?

* * * * *

The Witness: January, 1954, yes, my book, at that time my membership was in Anchorage, Alaska, and it's like I repeated before that I want my card to stay there until it's a year old so I have a right to vote for my officers as I didn't intend to stay at Palm Springs but a short time anyway. And another thing, lots of these locals have what we called, we had at that time in Anchorage a fund which we all voluntary, if one member dies, we will pitch in two or there dollars, too, for the Brother's widow. So if you got 2,000 members in your local that makes \$4,000.00 or \$5,000.00 to the Brother's

(Testimony of Clarence A. Dowdall.)

widow where in small locals in like Palm Springs, they don't have, you see. So I'd rather leave my membership there on account of my insurance for the benefit of my family. [1285]

* * * * *

Mr. Heimann: I know what the inference of that testimony is and I'm trying to rebut the inference. Are you willing to stipulate that James Adams was, in January, 1953, the president of San Bernardino and Riverside Counties District Council of Carpenters and Joiners of America?

Mr. Nicoson. Of course.

Mr. Heimann: Thank you, I accept the stipulation.

Trial Examiner: Very well, the stipulation is noted for the record. [1290]

* * * * *

Q. (By Trial Examiner): I direct your attention to General Counsel's 30 in evidence which I apprehend to be the temporary working card which, according to your testimony, was given to you on January 7 by Mr. Adams? A. Correct.

Q. Now, you testified that that writing on the back, "No. 61," was put on there by whom?

A. Mr. James Adams.

Q. At the time he put it on there, did he tell you what the purpose was of his writing it on the back of the card?

A. He wrote that on the back of the card so I could take this card back to the Unemployment

(Testimony of Clarence A. Dowdall.)

Bureau in Indio and sign it for my unemployment compensation.

Q. Well, did he explain the significance of the number, if any, was it just a number picked out of the air and put down?

A. No, they have a list in the Labor Temple. They have a [1291] list in the Labor Temple like that that all the Carpenters sign so as to get on this list to get this number and lots of men are on the list and my number was, I signed the last one on the list, my number happened to be out here, 61.

Q. Was it a sheet of paper resembling in any way Respondents' 7 for identification?

A. Yes, something like that sheet of paper.

Q. Well, did it have lines set up in the same fashion and a title up at the top containing the local union number and so on?

A. I definite would not say it had this head of carpenters union up there or not, I definitely, I couldn't—

Q. Did it have a heading showing an out-of-work sheet? A. I definitely never examined it.

Q. Was it lined as this one is, did it have lines running all the way down the page on which the names could be written?

A. Yes. Opposite this here my number was 61 and had lines there, yes.

Trial Examiner: Let the record show that the witness indicates a number 61 appeared at the extreme left-hand end of the line on which his name appeared.

(Testimony of Clarence A. Dowdall.)

Q. (By Trial Examiner): Do I understand from your testimony, then, that at the time that this document, General Counsel's 30, was given to you by Mr. Adams at or about the same time you did sign the sort of list you indicated? [1292]

A. Yes, I signed that list, yes, sir.

Q. Did Mr. Adams or anyone else explain the significance of the signing of the list and what would happen as a result of your having signed it?

A. Yes, Mr. Adams told me after I signed the list that, "Now," he says, "you can go back to Indio and give this Employment Bureau man down there this number 61 and then," he says, "he will make you eligible at the office to sign up for the unemployment insurance."

Q. Did he make any other statements by way of explanation as to the significance of your signature on that list?

A. He said the, my signature on this list does not entitle you to go to work here. He says, "You understand that?"

And I says, "I'm not signing my name on this list with the intentions of asking you for a job, see, or intention of going to work because," I said, "I always went out and found my own job." [1293]

* * * * *

EDWARD M. SILLS

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

(Testimony of Edward M. Sills.)

Direct Examination—(Continued) [1298]

* * * * *

Q. (By Mr. Heimann): Are there any cases in which one of such multiple companies has signed the master labor agreement?

A. Not by the card system, no. If I may clarify that? [1304]

Trial Examiner: Surely.

The Witness: The recent method of signature has been changed. Now, they list their corporations that they operate under and sign for all of those corporations if they want to, you see, and by the card system, why, we didn't require them to do that. Once they were covered by the card by mutual agreement with the labor unions, we considered them covered no matter what names they operated under.

Q. (By Mr. Heimann): When did that change from the card system take place, Mr. Sills?

A. Upon conclusion of the negotiations this year.

Q. Mr. Sills, did any of the Pardee enterprises pay membership dues to BCA after 1952? [1305]

* * * * *

The Witness: Yes.

* * * * *

Q. (By Mr. Heimann): In what name were they paid?

* * * * *

The Witness: Pardee Construction Company.

* * * * *

(Testimony of Edward M. Sills.)

Q. (By Mr. Heimann): Mr. Sills, after 1952, did the Pardee Brothers or any of them continue to attend membership meetings of BCA?

* * * * *

The Witness: Yes, they did.

Q. (By Mr. Heimann): After 1952 did the Pardee Brothers or any of them seek advice from you regarding the master labor agreement?

* * * * *

The Witness: Yes, they did. [1307]

* * * * *

Q. (By Mr. Heimann): Mr. Sills, I show you a document that has just been marked G.C. 33 for identification and I ask you if that is a document that was furnished to me by your office upon my request? A. Yes, it was. [1318]

Q. Would you tell us what that document is?

A. It is from L. A. Vie, Secretary, Los Angeles Building and Construction Trades Council, addressed to me referring to a communication regarding changes in AGC-BCA master labor agreement.

Q. In relations to the signing of the original of G.C. 5, when did you get G.C. 3 for identification?

A. It looks like November 5th, 1952. [1319]

* * * * *

Q. (By Mr. Heimann): Well, let me ask you this, did you at any time after that date discuss with Mr. Vie or write to Mr. Vie regarding the hiring clause that was then in effect in the master labor agreement?

* * * * *

(Testimony of Edward M. Sills.)

The Witness: I don't recall any conversation with regard to the hiring clause after we received this letter as being, closing the agreement between us as to changing the master labor agreement. [1321]

* * * * *

Q. (By Mr. Heimann): Mr. Sills, do you know the signature of Mr. Vie?

A. Fairly well, yes.

Q. How have you become familiar with the signature?

A. Through correspondence with him.

Q. Do you recognize the signature on G.C. 33 for identification as the signature of Mr. Vie?

A. It looks like it. [1322]

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 33 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 33

[Letterhead of Los Angeles Building and
Construction Trades Council]

Labor Temple, Room 603, 532 Maple Avenue
Los Angeles 13, Calif.

November 4, 1952

Mr. Edward M. Sills, Exec. Vice-President
Building Contractors Association
of California, Inc.

1571 Beverly Blvd.
Los Angeles 26, California

Dear Mr. Sills:

With reference to your communication of October 10, 1952 regarding the changes in the AGC-BCA-AFL Southern California Master Labor Agreement made necessary in order to comply with the National Labor Relations Act and particularly Article II (Union Security) and Article VIII, please be advised that at a regular meeting in executive session of the Los Angeles Building and Construction Trades Council on July 17, 1952, the Secretary of the Los Angeles Building and Construction Trades Council, under the heading of "Reports of Officers and Committees", reported to the Council the following:

"The Secretary stated that at a meeting which was held with the representatives of the Six Basic Trades with reference to the Union Security provisions of the Master Contract that would be inserted in the Contract made necessary by the National Labor Relations Act, that with the exception of one or

two minor clarifications of language, that it was acceptable to the Six Basic Trades.”

On the completion of the report of the Secretary, it was regularly moved, seconded and carried that the Council accept and concur in the report of the Secretary.

You may accept this communication as an acknowledgment of confirming the acceptance of the changes within the Master Labor Agreement made necessary by the National Labor Relations Act.

Yours very truly,

/s/ L. A. Vie, Secretary,

L. A. Bldg. and Constr. Trades
Council

LAV/gs

* * * * *

Q. (By Mr. Heimann): Mr. Sills, I show you a document which has just been marked G.C. 34 for identification and I ask you whether that document comes from your files.

A. Yes, it does.

Q. Would you tell us what the document is?

A. It's a signature card by Oltman's Construction Company to the master labor agreement.

* * * * *

Q. (By Mr. Heimann): The document was sent to you through the mail, I take it, from the postage stamp?

A. It bears a Monterey Park cancellation stamp, yes.

Q. Are you familiar with Mr. J. D. Roy?

(Testimony of Edward M. Sills.)

A. I have met him. [1325]

* * * * *

Q. (By Mr. Heimann): After receipt of G.C. 34 for identification, Mr. Sills, did you have any conversation or communications with officials of Oltman's Construction Company in which you advised them regarding the master labor agreement? [1327]

* * * * *

The Witness: Yes.

Q. (By Mr. Heimann): Did such officials of Oltman's Construction Company seek such advice? [1328]

* * * * *

The Witness: Yes.

* * * * *

Q. (By Mr. Heimann): Were these communications or conversations oral or written?

A. They were oral.

Q. And face to face or over the telephone?

A. Over the telephone. [1329]

Q. And would you tell us with whom you talked over the telephone? A. Bud Oltmans.

Q. Do you know Bud Oltmans connection is with Oltmans Construction Company?

A. He is a partner or one of the officers.

Q. Are you familiar with his voice?

A. Yes.

Q. Did you recognize it over the telephone?

A. Yes.

* * * * *

(Testimony of Edward M. Sills.)

Q. (By Mr. Heimann): Would you tell us when you had such conversations, approximately?

A. There's been two or three times in the past year.

Q. You don't remember the exact dates, is that it?

A. I don't remember the exact dates, no.

Q. Did Mr. Oltmans state to you for what purpose he was seeking advice? [1330]

* * * * *

The Witness: It was with regard to a labor dispute. [1331]

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 34 for identification was received in evidence.) [1332]

GENERAL COUNSEL'S EXHIBIT No. 34

Date: June 22, 1953

The undersigned desires to become a party to the Collective Bargaining Agreement between the Building Contractors Association of California, Inc., and the Building Trades Councils of the American Federation of Labor, and by signing this card, the undersigned hereby accepts and becomes a party to said Master Contract, and hereby acknowledges receipt of a copy of said contract.

Firm Name: Oltmans Construction Co.

/s/ By D. J. Roy, Vice Pres.

Phone: CU 34117

Address: 1560 W. Monterey Pass Rd., Monterey
Park

License No.: 86393

Classification: A SB 1

[Business Reply Card]

Building Contractors Association of California, Inc.
1571 Beverly Boulevard
Los Angeles 26, Calif.

* * * * *

Q. (By Mr. Heimann): Mr. Sills, I show you a document that has just been marked G.C. 35 for identification and I ask you if that comes from your files. A. It does.

Q. Would you tell us what it is?

A. It is a letter from J. F. Cambiano, International representative of the United Brotherhood of Carpenters and Joiners of America, addressed to me.

Q. And it was received by you, is that correct?

A. Yes.

Q. Can you tell us the date——

A. Looks like——

Q. ——of receipt?

A. It looks like May 4, 1954. [1333]

* * * * *

Q. (By Mr. Heimann): Will you tell us whether or not after receipt of this letter by you there were any negotiations with the Carpenters Union regarding the master labor agreement?

A. Yes, there was. [1334]

* * * * *

Mr. Garrett: Mr. Cambiano is the agent of respondents in all the matters concerned in the evidence of this case.

Mr. Heimann: At all times material?

Mr. Garrett: At all times material.

Mr. Heimann: So stipulated.

Trial Examiner: Very well, the stipulation is noted for the record. [1336]

* * * * *

(The document heretofore marked General Counsel's Exhibit 35 for identification was received in evidence.) [1337]

GENERAL COUNSEL'S EXHIBIT No. 35

[Letterhead of United Brotherhood of Carpenters
and Joiners of America]

17 Aragon Boulevard
San Mateo, California

May 3, 1954

Mr. Edward M. Sills

Building Contractors Association
of California, Inc.

1571 Beverly Boulevard
Los Angeles 26, California

Re: B.C.A.-A.F.L. Southern California Master Labor Agreement and Settlement Agreement of
November 30, 1950

Gentlemen:

You are hereby notified, in accordance with Paragraph 8 (b) of the Settlement Agreement between us and, since no agreement has been reached be-

tween us on or before May 1, 1954 in response to our demand as heretofore sent to you by letter on February 9, 1954, that on May 18, 1954 any and all of our above contract or contracts with you, including but not limited to the B.C.A.-A.F.L. Master Labor Agreement, and all Resolutions to Continue, with respect to said Master Labor Agreement, and that certain Settlement Agreement of November 30, 1950, shall be and hereby are terminated and at an end, effective as of the expiration of May 18, 1954.

You are hereby further notified that we elect and do so terminate said agreement and contract, or agreements and contracts, and each and all of them heretofore existing between us, in our own behalf, and separately, and as to the United Brotherhood of Carpenters and Joiners of America, and all of its affiliated Local Unions and District Councils in the twelve Southern California Counties, and as to all contractors and employers and their organizations, including the Associated General Contractors of America and the Building Contractors Association of California, Inc., effective as of the expiration of said May 18, 1954.

Very truly yours,

United Brotherhood of Carpenters
and Joiners of America,

/s/ By J. F. Cambiano,

International Representative For All Carpenters'
District Councils and Local Unions in the
Twelve Southern Counties of California

* * * * *

(Testimony of Edward M. Sills.)

Cross Examination * * * * *

Q. (By Mr. Garrett): Now, is it a part of the service—Pardee is a paid up member, I take it, of the Building Contractors Association?

A. Yes, he is, they are. [1395]

Q. You say “he is” or “they are”?

A. They are.

Q. Who is and who are?

A. Pardee Construction Company.

Q. Pardee Construction Company, right?

A. Yes.

Q. And not Pardee-Phillips and not Pardee Construction Company No. 2? A. No.

Q. And as paid up members of yours, they are entitled to all your services, are they not?

A. Yes, sir.

Q. And they are entitled to your services in labor relations? A. Yes.

Q. They are one of your members who you regard as being in that group that you handle labor relations for, correct?

A. That's right. [1396]

* * * * *

Mr. Nicoson: At this time respondent, Local 1400, Los Angeles County District Council of Carpenters move to dismiss the complaint in case No. 21-CB-548 in its entirety on the grounds that there are no substantial evidence here to sustain the allegations of the complaint.

Trial Examiner: Did you wish to make an extended statement or let the motion stand?

Mr. Nicoson: The motion stand.

Trial Examiner: Without requiring a view of the evidence at this time, I will state that I am satisfied with respect to the issues as I now understand them, the motion should be denied.

Mr. Nicoson: Respondent, Local 1400, and Los Angeles County District Council of Carpenters move to dismiss Paragraph 1 of the complaint in Case No. 21-CB-548 on the ground that there is no substantial evidence to prove the allegation of that paragraph.

Trial Examiner: Motion denied.

Mr. Nicoson: Respondent, Local 1400 and Los Angeles [1480] County District Council of Carpenters move to dismiss Paragraph 2 of the complaint in Case No. 21-CB-548 on the same grounds.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1400 and Los Angeles County District Council of Carpenters move to dismiss Paragraph 3 of the complaint in Case No. 21-CB-548 on the same ground.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1400 and Los Angeles County District Council of Carpenters move to dismiss Paragraph 4 of the complaint in Case No. 21-CB-548 on the same ground.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1400 and Los Angeles County District Council of Carpenters move to dismiss Paragraph 5 of the complaint in Case No. 21-CB-548 on the same ground.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1400 and Los Angeles County District Council of Carpenters move to dismiss Paragraph 7 of the complaint in Case No. 21-CB-548 on the same ground.

Trial Examiner: Mr. Nicoson, did you intend to skip 6 or intend to skip 7? [1481]

Mr. Nicoson: In my statement just past, I think I inadvertently used the reference to Paragraph 7 of the complaint. It should have been Paragraph 6.

Respondent, Local 1400 and Los Angeles County District Council of Carpenters move to dismiss Paragraph 8 of the complaint in Case No. 21-CB-548 on the same ground.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1400 and Los Angeles County District Council of Carpenters move to dismiss Paragraph 9 of the complaint in Case No. 21-CB-548 on the same ground.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1400 and Los Angeles County District Council of Carpenters move to dismiss Paragraph 10 of the complaint in Case No. 21-CB-548.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1400 and Los Angeles County District Council of Carpenters move to dismiss Paragraph 11 of the complaint in Case No. 21-CB-548 on the same ground.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1400 and Los Angeles County District Council of Carpenters

move to dismiss Paragraph 12 of the complaint in Case No. 21-CB-548.

Trial Examiner: Denied. [1482]

Mr. Nicoson: Respondent, Local 1400 and Los Angeles County District Council of Carpenters move to dismiss Paragraph 13 of the complaint in Case No. 21-CB-548 for the same reasons.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1400 and Los Angeles County District Council of Carpenters move to dismiss Paragraphs 14, 15 and 16 of the complaint in Case No. 21-CB-548 on the same ground.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local No. 1046 and San Bernardino and Riverside Counties District Council of Carpenters move to dismiss the complaint in its entirety in Case No. 21-CB-600 for the reasons that there is no substantial evidence in the record to support the allegations of the complaint or any of them.

Trial Examiner: Motion denied.

Mr. Nicoson: Respondent, Local 1046 and San Bernardino and Riverside Counties District Council of Carpenters move to dismiss Paragraph 2 of the complaint in Case No. 21-CB-600 for the same reasons.

Trial Examiner: Motion is denied.

Mr. Nicoson: Respondent, Local No. 1046 and the San Bernardino and Riverside Counties District Council of Carpenters move to dismiss Paragraph 3 of the complaint in [1483] Case No. 21-

CB-600 for the same reasons and on the same grounds.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1046 and San Bernardino and Riverside Counties District Council of Carpenters move to dismiss the complaint with respect to Paragraph 4 thereof in Case No. 21-CB-600 for the same reasons.

Trial Examiner: Denied.

Mr. Nicoson: Respondents, Local 1046 and San Bernardino and Riverside Counties District Council of Carpenters move to dismiss Paragraph 5 of the complaint in Case 21-CB-600 for the same reason.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1046 and San Bernardino and Riverside Counties District Council of Carpenters move to dismiss Paragraph 6 of the complaint in Case 21-CB-600 insofar as it alleges violation of Section 8 (b) (1) A of the Act for the same reason.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1046 and San Bernardino and Riverside Counties District Council of Carpenters move to dismiss Paragraph 6 of the complaint in Case No. 21-CB-600 insofar as it alleges a violation of Section 8 (b) (2) of the Act for the same reasons.

Trial Examiner: Denied.

Mr. Nicoson: Respondent, Local 1046 and San Bernardino [1484] and Riverside Counties District Council of Carpenters move to dismiss Paragraph

7 and 8 of the complaint in Case No. 21-CB-600 for the same reason.

Trial Examiner: Denied.

Mr. Nicoson: Respondents now move to sever Cases No. 71-CB-548 and 21-CB-600 so far as further proceedings in this case are concerned on the ground that the evidence now discloses that there is no connection between either of the cases and were improperly joined in the first place.

Trial Examiner: Motion to sever denied.

Mr. Nicoson: I call Robert O'Hare.

ROBERT J. O'HARE

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Nicoson): State your name for the record, please, sir. A. Robert J. O'Hare.

Q. What is your business address?

A. 2439 Santa Monica Boulevard, Santa Monica.

Q. What is your business or occupation?

A. Representative, labor representative for the Carpenters.

Q. Do you have any connection with any particular local of the Carpenters?

A. Carpenters Local 1400, Santa Monica. [1485]

Q. What position, if any, do you occupy with this organization?

A. Treasurer and business manager.

Q. I take it you are familiar with the duties

(Testimony of Robert J. O'Hare.)

and obligations, responsibilities of the business manager? A. I think so.

Q. Will you tell us what a business manager does?

A. He represents the people in the field and sees that the dispatcher dispatches the men according to the National Labor Relations Board and have them sign the sheet as the same, when the contractor calls for the men, why, they send them out accordingly.

Q. What do you mean by representing men in the field?

A. Well, in labor disputes or, for instance, if they don't get their wages or if they don't, get a bad check, we collect it. We probably have to put a lien on the property. Or any other disputes that come under the heading of the labor disputes such as jurisdiction or limiting to the by-laws and constitution of the Brotherhood.

Q. Is it or is it not a fact that you adjust grievances which the members of your organization make—— A. That is true——

Q. ——with employers. Now, with respect to working rules and by-laws which you have just mentioned, will you be a little more specific as to what it is you do with respect to the by-laws [1486] and working rules and so forth?

A. Well, the by-laws and the working rules, we have an agreement between the contractor such as Association General Contractors, Building Contractors Association, Home Builders Contractors

(Testimony of Robert J. O'Hare.)

and Excavating Engineers Associations that they will hire the men through the hall and men out of work will sign the list as per the National Labor Relations Board through Mr. LeBaron when he was in there, the agreement that we have with the contractors and the unions by and between them.

Q. What do you mean "as per Mr. LeBaron when he was in there?"

A. Well, it's an agreement that has been, as we understand it, been O.K.'d by the National Labor Relations Board that when the men are out of work that they come to the hall, they sign the out-of-work list as to whether they are rough carpenters or finished carpenters and must be in the hall the next morning if they are to be sent out.

Q. And that is an arrangement that came from Mr. LeBaron, is that correct?

A. That is as I understand it.

Q. How long have you been a business——

Mr. Heimann: I move to strike the witness' answer on the ground that it is hearsay as revealed by his last answer.

Trial Examiner: What is the basis of your understanding, Mr. O'Hare?

The Witness: Understanding of what? [1487]

Trial Examiner: What the requirements with respect to the dispatch are as established through the agency of Mr. LeBaron, if I may so paraphrase?

The Witness: That the men out of work sign the out-of-work list and that they are called from the top of the list.

(Testimony of Robert J. O'Hare.)

Trial Examiner: In other words, your understanding is that the management of the out-of-work list in the union hall was a subject that was settled in some respect through the mediation or at the suggestion of Mr. LeBaron of this agency?

The Witness: That's right, by and between this agency and the contractors and the building trades groups.

Trial Examiner: Now, the question posed by Mr. Heimann's objection was this, upon what personal knowledge do you base that understanding?

The Witness: On the short form agreement that we have as to the men working in the area and the time they work in the area and who they worked for and when they worked there.

Trial Examiner: Motion to strike granted.

Q. (By Mr. Nicoson): Mr. O'Hare, what the Trial Examiner I think probably wanted to know, and he was directing his remarks or questions to your statement that you understand this to be a fact, and he wanted to know on what basis that you had reached that understanding, in other words, from where did you get your information if you got any that Mr. LeBaron participated, if that is what it was, in this arrangement for [1488] agreement?

A. Well, I just don't exactly know what date it was but we had a meeting at this hotel up here off of Seventh and Wilshire. I can't remember the name of the hotel, what it is up there, but all the trades were in there one day and Mr. Harrington and Mr. LeBaron were both there.

(Testimony of Robert J. O'Hare.)

Trial Examiner: Were you there?

The Witness: I was there, positively. Yes, sir, I was there and there were several other agents of all crafts in the building trades there.

Q. (By Mr. Nicoson): Now, let's see if we can fix the approximate time. How long ago do you say that was?

A. Quite some time ago. It was before Mr. LeBaron quit, sometime before he went out of this office.

Q. Was it last year, the year before or the year before that? A. I think it was last year.

Q. Last year, 1953? A. 1953.

Q. In this hotel on Seventh and Wilshire?

A. At approximately the Westlake District, a short walk from the Carpenters Hall around there, I can't think of what that, the first time I was ever in there.

Q. That is here in the City of Los Angeles?

A. That is in the City of Los Angeles.

Q. Is it a large hotel or a small hotel? [1489]

A. Large hotel. I can't think of what the name of it is, whether the Wilshire or Embassy.

Q. Park Wilshire?

A. Park Wilshire, pardon me, that is the name, Park Wilshire.

Q. Did Mr. LeBaron and Mr. Harrington have anything to say at that meeting?

A. They discussed the——

Q. Just answer me yes or no. A. Yes.

(Testimony of Robert J. O'Hare.)

Q. Did they talk anything about that arrangement of the clause for hiring men?

A. Yes, it was talked of up there that day.

Q. Did Mr. LeBaron have anything to say about it?

A. Yes, he did.

Q. Did Mr. Harrington have anything to say?

A. Yes, sir, he did.

Q. Tell us what Mr. LeBaron had to say?

A. As near as I can recollect was that the policy was, it appears that the first agreement that was drawn up was not workable and that in this one, it was a discussion as to the workability of this one that was going, that was O.K.'d now, or to be O.K.'d at that time.

Q. Did Mr. LeBaron have any paper or read from anything?

A. I don't think he did, I'm not positive. I couldn't say for sure. [1490]

Q. Did Mr. Harrington have anything to say?

A. Yes, Mr. Harrington spoke on the case, too, as to the legality.

Q. On the same subject?

A. On the same subject.

Q. Do you recall what Mr. Harrington said, in substance?

A. No, I can't recall what was said, the substance, because so much discussion pro and con as to what was good and what wasn't.

Q. Do you recall anything that Mr. Harrington said?

A. Yes, it was in regard to the eligibility of, I

(Testimony of Robert J. O'Hare.)

remember the question was asked as to the eligibility of the men working in the area and how long they had worked for a contractor such as if a man had worked with a contractor for the past ten years in an area where he was applying for work that he would be eligible for even as far as ten years back, that he was entitled to work if he had worked for a contractor in that area before.

Q. Do you recall whether or not either Mr. LeBaron or Mr. Harrington, perhaps, both of them said anything one way or the other about a list of employees or a work list? Answer that yes or no.

A. I don't remember whether that was discussed or not. I won't say yes to anything I'm not positive of.

Q. All right. Was anything said by Mr. LeBaron or Mr. [1491] Harrington or both about the hiring of employees?

A. I don't recollect as there was.

Q. Now, while Mr. LeBaron and Mr. Harrington were present, one or both, did anybody read any paper or pass out any paper there?

A. No, I don't think there was. I think it was a general discussion that day with the different crafts as to what the rights and what was right and what was not right.

Q. I'm going to show you a document that has been marked as Respondents' Exhibit 6 for identification. I'm going to ask you to look at it and tell me whether or not any of the subjects or matters contained on that document was discussed at the

(Testimony of Robert J. O'Hare.)

time Mr. LeBaron and Mr. Harrington were present at this Park Wilshire meeting, if you recall.

A. I am—I might say, yes, that (a), (b), (c) paragraphs, (a), (b) and (c) being in this here, they definitely were discussed. There was questions asked pro and con as to that.

Trial Examiner: Let the record show that the witness indicates by reference to Respondents 6 for identification that subparagraphs (a), (b) and (c) of Section III as shown on Respondents' Exhibit 6 were discussed and that the following text paragraph immediately below subparagraphs (c) of Section III was discussed.

Mr. Heimann: May I see that last one, please?

Q. (By Mr. Nicoson): Well, these paragraphs that you have [1492] just told the, just mentioned to the Trial Examiner, did Mr. LeBaron or Mr. Harrington participate in the discussion of those paragraphs?

A. I couldn't say for positive that they did but they were brought up there pro and con as to the workability of them at that time.

Q. They were discussed in Mr. LeBaron's and Mr. Harrington's presence, is that correct?

A. That's right.

Q. Do you recall whether Mr. LeBaron, Mr. Harrington, or both of them, had anything to say as to their participation, if any, in the construction of what is in this document under Roman Numeral III?

A. I might say, getting to Mr. Harrington, that

(Testimony of Robert J. O'Hare.)

Mr. Harrington simply was answering questions of a legal nature that were brought up there by anyone in there and most of the talking was done by Mr. LeBaron. Mr. Harrington was sort of advisory as to whether it was right or wrong.

Q. Will you state whether or not Mr. LeBaron mentioned at that time and place whether or not the paragraph, or Section III as it appears in that document satisfied the provisions of the Taft-Hartley Act?

A. That was my understanding of the discussion.

Q. Did you understand him to say that?

A. I did understand him to say that. [1493]

Q. Did you understand Mr. Harrington also to say that?

A. No, I couldn't say Mr. Harrington verified it or anything of that kind. Mr. Harrington was merely answering questions as referred to in a legal nature.

Q. I understand that. Do you recall any of the legal nature that was discussed?

A. No, I don't because there was too many of them there at the time.

Q. Prior to the discussion with, at which Mr. LeBaron attended, did Local 1400 have any arrangement such as appears to have been set up in Section III of this document which I have before you?

A. Yes, that is the way we operated, still operate that way.

(Testimony of Robert J. O'Hare.)

Q. You operated that way before?

A. That's right.

Q. Before Mr. LeBaron's statement?

A. That's right, before some time.

Q. You now operate in that same fashion?

A. Same manner.

Q. In other words, so far as Section III is concerned, that outlines how you handle the dispatching of men on the work list? A. That's right.

Mr. Heimann: I object to the question without further specification of the time. We only have "before" but not what period before this. [1494]

Q. (By Mr. Nicoson): All right, tell the gentlemen how long before Mr. LeBaron spoke, did you have such arrangement?

A. I might say we had that arrangement for the past three or four years.

Trial Examiner: Prior to the Wilshire meeting?

The Witness: I mean now, at least two years before the Park Wilshire meeting. ..

Trial Examiner: Very well.

Q. (By Mr. Nicoson): Directing your attention to on or about the afternoon of December 4, 1954, at or around 4:00 p.m., I will ask you whether or not you had a conversation with Mr. Clarence Dowdall who sits over there at the right of Mr. Heimann. A. As far as I recollect, yes.

Q. Where did that conversation take place?

A. At the Carpenters' hiring hall at 2439 Santa Monica Boulevard, Santa Monica.

Q. Is that Local 1400? A. Yes.

(Testimony of Robert J. O'Hare.)

Q. You were there? A. I was there.

Q. Mr. Dowdall was there?

A. That's right.

Q. Who else was present during the conversation?

A. Dockery, Mr. Dockery, Mr. Savage.

Q. That is Mr. William Savage? [1495]

A. Mr. William Savage, recording secretary and dispatcher.

Q. And Mr. Dockery, that is Mr. Johnny Dockery? A. That is Mr. John Dockery.

Q. You knew Mr. John Dockery, did you, before that time? A. Yes.

Q. He was a member of your local prior to that time? A. Prior to that, yes.

Q. Was anyone else present during this conversation? A. Not that I remember of.

Q. Will you now tell us what the conversation was and give us who made the statements and what they were, please?

A. I called from the field to see what's going on.

Q. Let's confine yourself——

A. I'm going to have to tell this to get——

Q. You tell me what happened to the meeting and I will bring you out from the field.

A. At the meeting, in arriving here at 4:00 o'clock, Mr. Savage said that Mr. Dockery and Mr. Dowdall was there to talk to me about a work order.

(Testimony of Robert J. O'Hare.)

Mr. Heimann: May I ask at which meeting that was?

Trial Examiner: You place this December 4, 1953?

Mr. Nicoson: That's right, at or about 4:00 o'clock in the afternoon.

Mr. Heimann: That was at the hall of Local 1400?

Mr. Nicoson: That is what the gentleman said.

The Witness: At that time I was informed that they had been to the Pardee Construction job and that when they first came in that they had not been cleared into any local, that their cards were in Alaska, and that they had a request from Pardee Construction Company, their names were not on the out-of-work list and that they had a request in there for them to go to work.

According to the agreement, my understanding is——

Q. (By Mr. Nicoson): Never mind what's according to the agreement. You tell us what was said.

Trial Examiner: Before you go any further, Mr. O'Hare, you say you were so informed, informed by whom?

The Witness: Informed about what?

Trial Examiner: You just recited what you were told when you got at the hall?

The Witness: Savage. This was Savage. That they had been there to the job and that they requested to go to work, were not on the out-of-work list. I told them that they had to sign the list.

(Testimony of Robert J. O'Hare.)

Q. (By Mr. Nicoson): You told whom?

A. I told Dockery and Dowdall that they had to sign the list in order to go to work, they had to be on the list and we take the list as they come off of there. They hadn't signed the list at that time, not to my knowledge.

Mr. Heimann: I object to the last statement, [1497] again, not referring to anything that he told anybody present at that time.

Mr. Nicoson: It may go out.

Q. (By Mr. Nicoson): Just confine yourself to the conversation, Mr. O'Hare.

A. And they wanted to know why they couldn't go to work and I told them that, according to their actions, they were subject to a fine from the Brotherhood for violation of their trade rules.

Q. Was anything else said at that time?

A. Yes, there was a discussion, a heated discussion come up and I don't exactly remember what was said so if I don't exactly remember what was said, I'm not going to repeat anything I'm not sure of.

Q. Go ahead, tell us what was said as you now remember.

A. Well, as I remember, I simply told them what the by-laws were and the rules of the local and what they had to do in order to get out of there to get out on the job.

Q. What did you tell them?

A. I told them they had to sign on the list, the out-of-work list, and that the contractor was sup-

(Testimony of Robert J. O'Hare.)

posed to call us for the men and men were sent off the list and they come in on rotation.

Q. Mr. Dowdall has testified in this record that during this conversation you handed him the document which is now in front of you marked Respondents' Exhibit 6, is that so or not?

A. That is true, or a similar document. I don't [1498] know whether this is the one or not but I handed him one of the agreements.

Q. Do you have any reason to believe that that sheet of paper with printing on in front of you is not the document that you handed to Mr. Dowdall?

A. No, I have no reason to believe that it isn't.

Q. Did you have any conversation with Mr. Dowdall and Mr. Dockery with respect to the work list other than what you have told us?

A. I would like to say this, that my conversation was mostly with Dockery.

Q. All right.

A. My, Mr. Dowdall was in the background and he was doing a lot of talking and I was paying attention to Dockery.

Q. What did you say?

A. I knew Dockery as a member of the local before.

Q. Tell us what you said and what he said.

A. I simply told Dockery he knew what the score was, he had been a member of the local before and he knew what the requirements were.

Q. Anything else?

(Testimony of Robert J. O'Hare.)

A. I told him the same, that he had to sign the out-of-work list in order to get on the job.

Q. Did Mr. Dockery have anything to say about that?

A. I don't remember what Mr. Dockery said. He didn't, Mr. Dockery didn't say too much. He said [1499] he simply wanted to know why the hell he couldn't get on the job.

Q. Through your job as business manager, I believe you said you knew Mr. Dockery?

A. That's right.

Q. For some period of time. How long had you known Mr. Dockery?

A. I probably have known, he belonged to our local for about a year, but he had worked in and out of our district previous, prior to going to Alaska.

Q. Over what period of time had he worked in and out of your district?

A. I think he probably worked out of there a year prior to going to Alaska.

Q. A year prior to going to Alaska. Do you know whether or not during that period of time that he was ever sent out to any jobs?

A. No, I don't because the dispatcher handles all of that. I don't dispatch them into the jobs.

Q. That would be something with Mr. Savage?

A. That would be something with Mr. Savage.

Trial Examiner: As I understand your testimony, Mr. O'Hare, your recollection now is that Mr. Dockery had worked in and out of Local 1400

(Testimony of Robert J. O'Hare.)

jurisdiction during the 12 calendar months immediately before he left to go to Alaska?

The Witness: Well, yes, that's right. [1500]

Q. (By Mr. Nicoson): Now, before Mr. Dockery went to Alaska, did this hiring arrangement which is now incorporated in Section 3 of Respondents' 6 which is before you, was that in effect at that time? A. Oh, yes.

Q. Did you see either Mr. Dockery or Mr. Dowdall or both of them sign anything while they were there in your office? A. No, I didn't.

Q. Did you see Mr. Savage hand them a work list?

A. The work list is in the window. I didn't see Mr. Savage hand them the work list.

Q. Did you ever prefer any charges against Mr. Dowdall or Mr. Dockery? A. No, I didn't.

Q. Do you have any authority to fine either one of these gentlemen?

A. I have no authority to fine anybody.

Q. Do you know a Mr. Stephen Mazurek?

A. Yes, I do.

Q. How long have you known him?

A. Oh, 15, 20 years.

Q. Does he have any connection with Local 1400? A. He is trustee of Local 1400.

Q. How long has he been so engaged?

A. On and off, last time, four years. [1501]

Q. Do you know whether or not Mr. Mazurek

(Testimony of Robert J. O'Hare.)

came to your office during the conversation you were having with Mr. Dowdall?

A. I saw him in the hall that afternoon.

Q. Did you see him in your office? A. No.

Q. You don't know whether he was in there or not?

A. No, I saw him in the hall, I saw him pass through in the hall.

Q. After you had this discussion with Mr. Dockery and Mr. Dowdall with respect to the work list and the other thing which you related, did Mr. Dowdall and Mr. Dockery and Mr. Savage then leave?

A. No, I think I left.

Q. You left? A. I left.

Q. By the way, what is the size of the office in which you were meeting these gentlemen?

A. The office itself, they were in the window. The office itself, it's about 8 by 10 or something like that, roughly. It's a small office.

Q. Two desks or three desks?

A. Two desks is all and a file, couple of files.

Q. And the window through which these men talked with you?

A. That's right, a window through which they talked.

Q. Do you recall whether or not you said [1502] anything to Mr. Dockery, to Mr. Dowdall or to both of them that if you signed the list that you would call them for assignment when their name came up?

A. No, we don't call anybody for work.

(Testimony of Robert J. O'Hare.)

Q. Did you say anything like that?

A. No, I didn't.

Q. What is your practice in regard to that?

A. To sign the list rough or finish, rough or finish carpenter and they put that down there and they put their telephone numbers down if they wish.

Q. Is that a requirement?

A. No, not a requirement.

Trial Examiner: If it is put down by the individual if he wishes to, is it the union's practice to make use of that information in any way?

The Witness: The only way we call them down is if a contractor, if he had been working for a contractor and the contractor called in there and said, "I want Charlie Smith," why, we call Charlie Smith at the request of the contractor.

Q. (By Mr. Nicoson): Otherwise, the list would work first in, first out?

A. They have to be there in the morning. The office is open at 7:00. They have to be in there in the morning when names are called at the top down the list. They start at the top and take them as they come down if they can handle the job. [1503] It says "Rough" and "Finish." If it is a finish job, a finish carpenter takes it. A rough carpenter, he is passed by automatically passes himself or disqualifies him.

Q. Mr. O'Hare, the procedure is clear to you since you probably have been following it for years but it may not be clear to the Trial Examiner or

(Testimony of Robert J. O'Hare.)

may not be clear to somebody else who may be called upon to read this record.

I'm going to ask you to tell us in layman's language how the assignment of work is handled in your office.

A. For instance, a man comes off from a job. That evening at 4:00 o'clock, the office closes at 4:30, he comes in and says, "Well, have you got anything for me?"

He is told to sign the list and come in the morning.

Q. Who comes in the morning?

A. The carpenter comes in the morning and then at——

Q. Where does he come?

A. He comes to the hiring, union hiring hall at 2439 Santa Monica Boulevard.

Q. Does he have any particular time at which he is supposed to be there?

A. No, at any time after 7:00 o'clock.

Q. All right.

A. We dispatch, as a rule, between 7:00 and 9:00. The contractor wants the men on the job at 8:00 o'clock so we take the list and call the list and whoever is there that can handle the [1504] work, takes it.

Q. What do you mean, call the list?

A. For instance, Charlie Smith is at the top and Jimmie Jones is second. One's a rough carpenter and the other is a finished carpenter and the call is for a finished carpenter. The second man gets it

(Testimony of Robert J. O'Hare.)

because he's the finish carpenter that can take the work.

Q. How do you determine, if you do?

A. Whether they are finish or rough carpenters?

Q. No, whether anybody is to be called or not?

A. The contractor requests them. He calls us for them the day before, gives us the name and address of the jobs and they tell us what they want, whether they need rough men, scaffold men, floor men or layout men or foremen or roofers, whatever they are, and we try to fill the job as the men in the hall are required and, so that, if we don't have the men that are required, we call the other nearby locals in order to fulfill the agreement we have by and between the contractor to service them.

Q. Now, go ahead. We got to the stage where the contractors have indicated to you that they want certain types of men and, I assume, that they tell you how many? A. That's right.

Q. How do you proceed from there, you have received that information either by personal call, [1505] telephone call or by letter, is that right?

A. That's right. Then we write a work order.

Q. Wait a minute. Now, assuming that you have, as you have indicated, calls for roofers, floor men, rough, finish carpenters and you have several men on the list, will you now tell us just how you go about it and what you do in order to fulfill the request of the contractors?

A. Well, the first thing we do, we get a call from

(Testimony of Robert J. O'Hare.)

the contractor. He says, "I need three framers, two roofers."

The first thing, we call out and say we need three framers and two roofers and will you fellows be quiet so we can call you. There was always a hassle, so many in there waiting sometimes. And then we call the names as they come down there because for rough or framing, we call the rough men and we call them down there and, also, for framing, the roofers come out of the framing, too. So we call them and ask them who can do the roofing and who can do the framing. Then we assign those men with the work order to the job to the contractor.

Q. Now, this work order you are talking about, is that a written instrument?

A. That is a written instrument and we keep a copy of it.

Q. I now show you a document which has been marked Respondents' Exhibit 3 for identification and ask you if that is a copy of a work order which you have just spoken about. [1506]

A. That is a copy.

Q. What happens when you make out one of those work orders, if anything?

A. The only thing, you keep one and give one to the man to go to the job for the contractor.

Q. Well, do you give him any instructions as to what he is to do with it after he gets to the job?

A. Oh, yes, when he goes to the job he has to report to the steward and to the foreman on the

(Testimony of Robert J. O'Hare.)

job. The steward, in turn, takes this up and marks his name in the steward's card.

Q. Is that a matter of daily routine?

A. That's right.

Q. I will ask you this, taking the example that you have given us where you have a call for three roofers and two something else, I forget what they were, myself——

A. Framers.

Q. Framers, and the first man on the list is not qualified to do either of those jobs, what happens to him?

A. We take, we go down the line, we take them until we find somebody that can do it.

Q. Does he lose his place on the list?

A. No, he does not.

Q. He stays in his same position?

A. He stays in his position.

Q. He stays in the same position until the job [1507] comes up that he can qualify or that he wants to take?

A. That is about it, yes.

Q. In other words, are they required to take these jobs once you call these names?

A. Not if they don't want to take them.

Q. And if they decline to take the job, do they lose their place on the list?

A. No, they don't. I may state this, that the only time they lose their place on the list is when they take a job.

Q. All right. Now, after you have made out the work order and given it to the man with instructions that he report to the job to the shop steward

(Testimony of Robert J. O'Hare.)

and to the foreman, do you have any further connection with that man on that job?

A. Not unless he has a dispute on the job over his wages or jurisdictional dispute, maybe.

Q. Something which would come under the head of what you mentioned a while ago as representation in the field? A. That's right.

Q. I show you another document which, for the purpose of identification, has been marked Respondents' Exhibit 7 which is entitled "Out-of-Work Sheet." Have you ever seen any such document as that before?

A. Yes, sir, that is one of our documents.

Q. That has your local number printed on the top? A. That's right. [1508]

Q. Do you know how those lists are made up?

A. Yes, these are made up by the dispatcher who is the secretary. He types the numbers in here and as the men sign them. See, they are crossed off the out-of-work list to go to work. He has no phone number. Some put their phone number on and some don't. And then, as I say, they go down the list and whoever can take the work, they are marked. Some of them don't mark, they take anything, that means that they will do anything.

Trial Examiner: Let the record show that the witness in giving his last response referred by pointing his index finger to the two columns immediately adjacent on the form to the column containing a series of numbers in rotation, the first of the two columns immediately to the right of the

(Testimony of Robert J. O'Hare.)

number column being headed with the letter "R," the second column immediately to the right of the column headed "R" being headed with the letter "F". Do I interpret your last response correctly, Mr. O'Hare, as indicating that the letter "R" stands for rough carpenter and the letter "F" stands for finish carpenter?

The Witness: Right.

Trial Examiner: An "X" mark in either one column or the other opposite the particular name indicates the particular type of work that that individual wishes to take or feels qualified to take?

The Witness: That's correct.

Trial Examiner: And in the absence of any "X" mark it indicates that the individual feels qualified to take either kind of work and desires to take either kind?

The Witness: That's right.

Q. (By Mr. Nicoson): Now, I call your attention to the typing at the top of the page, at least, up in the upper right-hand which seems to be typed in red ink, the word "Sheet 1."

Do you have any idea who would put that on there?

A. The secretary and dispatcher, Mr. Savage.

Q. Mr. Savage—

Mr. Heimann: Could I have the last question read back, please?

(The question was read.)

Q. (By Mr. Nicoson): I also call your attention to what appears to be typing at the top of the

(Testimony of Robert J. O'Hare.)

page in red ink the words "From December 1st, 1953."

Do you know who put that on there?

A. Well, I don't know who put it on there other than Mr. Savage in the office. He is the only one that would put it on there. Brother Savage is the only one that handles this sheet.

Q. Have you in your experience as a business manager seen more than one of these work lists?

A. You mean the duplicate of these work lists? [1510] No, we just have——

Q. No, I'm sorry, more than one set of work sheets?

A. No, we just have the one set of work sheets. We have no duplications.

Trial Examiner: Have you seen one with different dates than December 1st and December 8th?

The Witness: That have these same names?

Trial Examiner: Have you ever seen a form like that with a different date at the top?

The Witness: No, I haven't.

Trial Examiner: Very well.

Mr. Nicoson: I don't think you quite understand, either one of you.

Q. (By Mr. Nicoson): Do you know, Mr. O'Hare, what the words up at the top of the page "From December 1st, 1953 to December 8th, 1953," are put on there for? A. Yes, I do.

Q. What are they put on there for?

A. That is the first day of signing this in. The following Tuesday, they call the sheet off and call

(Testimony of Robert J. O'Hare.)

the names, those in the hall sign the sheet. Those that are not in the hall, those names are off until they come in and sign them.

Q. What the Trial Examiner wants to know and what I very much would like to know is whether or not you have ever seen any other work list which did not have on it the date from [1511] December 1st, 1953, to December 8th, 1953?

A. What do you mean, from December 8th to——

Q. Listen to what I said, please.

Mr. Nicoson: Read the question to the witness.

(The question was read.)

The Witness: I never seen any other work list which has December 1st to December 8th on it.

Trial Examiner: Mr. O'Hare, once again you misunderstand both Mr. Nicoson and myself. You testified that, in effect, if I interpret your last answer correctly, that this particular list became out of date and had no further significance on December 8th?

The Witness: That's right.

Trial Examiner: What happened after that?

The Witness: Then, there's another work list that is signed the following week. These work lists are signed weekly.

Trial Examiner: Go ahead.

Q. (By Mr. Nicoson): The one that followed that, would that bear the date December 1st, 1953 to December 8th, 1953? A. No, it wouldn't.

Q. It would bear a different date?

(Testimony of Robert J. O'Hare.)

A. A different date.

Q. All right. Have you seen any other work sheets that bore different dates from the one on Respondent's Exhibit 7?

A. Oh, yes, I have seen many. [1512]

Q. Over what period of time?

A. Oh, for the last couple years I have, or more.

Q. Have you ever seen any work sheets that did not have at the top of it a date which indicated that the work sheet was good for only one week?

A. No, I haven't.

Q. I believe you have testified, or maybe you told me off the record, that so far as the actual manual handling of this sheet is concerned, that is Mr. Savage's job?

A. That's correct.

Trial Examiner: Before you pass on to a different subject, Mr. Nicoson, there were one or two questions of a more or less technical nature I think I might possibly interpose at this time with respect to the entries on the sheet.

Q. (By Trial Examiner): We have had an explanation of the number column, the column headed "R" and the column headed "F". The name column is self-explanatory and I believe you testified, Mr. O'Hare, that the presence of a line drawn through a particular name indicates that at some time when this sheet was in use, that individual answered the call and received the work order?

A. That's correct.

Q. Some of the names that have lines drawn through them have entries in ink which, appar-

(Testimony of Robert J. O'Hare.)

ently, indicate dates. Can you explain the significance of those dates? [1513]

A. No, I can't other than they might be people that are on the unemployment and that he puts those down there for reference if the unemployment office calls to find out if they are eligible for work or if, there's been lots of times these fellows won't take work and they are following them up through the unemployment bureau to see if they are doing chiseling that is the only thing. I don't know what it is on there for, to be truthful, unless it is for that because we try to cooperate with the unemployment office with the chiselers.

Q. Now, the column headed "Phone Number," that would seem to be self-explanatory. The final column is headed "Local Number" and I notice some, from an inspection of the various sheets in Respondents' 7 for identification, that in a large number of cases No. 1400 appears there. What would that entry in the Local column indicate?

A. The man who puts it down simply puts down the local number that he belong to. Doesn't have to put it down if he doesn't want to. You will notice every now and then they don't put it down there.

Q. Well, if a man puts down 1400, that means he was a local—a man of this particular local?

A. 1913, a member of 1913 or 844 or whatever it happens to be. You see on that sheet different locals, 1478, 5063 and 1913, 563. Those are outside

(Testimony of Robert J. O'Hare.)

members that come from other [1514] locals and sign their names.

Trial Examiner: I have nothing further.

Q. (By Mr. Nicoson): Do you know whether, Mr. O'Hare of your own knowledge, whether there is a practice among the Carpenters to register at more than one local? A. That is true.

Q. Each week?

A. That is right. I might say that they start out early and go from one local to the other to see where the best chance that they can get to work. That is a privilege that they are entitled to.

Mr. Nicoson: That is all. You may cross examine.

Cross Examination

* * * * *

Q. (By Mr. Heimann): Mr. O'Hare, you testified that the agreement that you had with the Associated General Contractors and the Building Contractors Association states that the men must be in the hall the next morning?

Mr. Nicoson: Objected to on the ground that is not what he testified to, improper interpretation of his testimony.

Q. (By Mr. Heimann): Well, will you tell us what you did [1515] testify in that respect?

* * * * *

The Witness: In respect to what?

Q. (By Mr. Heimann): In respect to what the agreement says as to the requirement that men are in the hall the next morning.

(Testimony of Robert J. O'Hare.)

A. I didn't say that the contractors agreement was that the men, I said the local requires them to be in the hall.

Q. Is it your testimony now that that is a requirement of the local and not of the contract?

A. Yes, insofar as I know, yes. [1516]

* * * * *

Q. Now, you told Mr. Dockery and Mr. Dowdall that they had to sign the out-of-work list, is that right?

A. That's right. [1518]

* * * * *

Q. I show you Respondents' No. 7 and call your attention to the words "Permit" in the lines following the names of Mr. Dockery and Mr. Dowdall. Do you know who put these two words "Permit" down?

A. I didn't see these men sign or put them on.

Q. Do you know who put the word "Permit" down?

A. No, I don't know. [1519]

* * * * *

Q. Now, Mr. Dockery showed you a work request from the superintendent on the Pardee job, didn't he?

A. I don't remember whether Mr. Dockery or Mr. Dowdall, either one showed me a work request for a job.

Q. Well, you told them they were subject to fine?

A. I told them they were subject to fine, yes.

Q. What for?

A. For going to the job without clearing into the local, into the District Council.

(Testimony of Robert J. O'Hare.)

Q. What do you mean without clearing into the local or through the District Council?

A. Men come in here from Alaska without clearing. The by-laws say they must be cleared before seeking work.

Q. What do you mean by "must be cleared," explain that procedure?

A. Must have a card in this local or is in some other in [1521] the Council, according to the constitution.

Trial Examiner: We have had some testimony here, Mr. O'Hare, that the process of getting a card into a particular local, depositing a card, as is the phrase that has been used, involved a transaction between the individual and the officials of the particular local, and that the procedure in the alternative involving a reference to the District Council is a procedure which has been described here as taking out a temporary working card. Is that what you have reference to?

The Witness: That's right.

Mr. Heimann: Is it your practice not to send a man out until he has either deposited his card or has obtained a temporary working card?

The Witness: That is correct.

Q. (By Mr. Heimann): Now, I'm not very familiar with your by-laws but if you call up men for a job, if a contractor requests them and they have worked for a contractor before, why would Mr. Dockery be subject to a fine for getting a request from the Pardee job?

(Testimony of Robert J. O'Hare.)

A. Dockery would be subject to a fine for not clearing into the local for going to work or expulsion from the Brotherhood. That is the way the constitution reads.

Trial Examiner: Well, the particular question that a Mr. Heimann asks is where was the particular thing that was wrong in Mr. Dockery's procedure?

The Witness: That is what was wrong.

Mr. Nicoson: No, no, the question was why and he gave him an answer.

The Witness: I gave him an answer.

Trial Examiner: I don't understand the answer.

Mr. Heimann: The answer did not answer my question.

Mr. Nicoson: He asked why he had been subject to a fine and he told him because he didn't clear into the local as the constitution provided for.

The Witness: That is just exactly the answer. You asked me why.

Trial Examiner: I don't understand that answer.

The Witness: You don't understand the answer?

Trial Examiner: No.

The Witness: Why, to go further back, why, they came in here, they didn't, according to the constitution, they didn't clear into any local or did they get any clearance from the District Council. That is the constitution and by-laws. He asked me why that I told Mr. Dockery that he was subject to a fine. That is why I told him he was subject to a fine.

(Testimony of Robert J. O'Hare.)

Trial Examiner: Let me see if I understand you clearly. What Mr. Dockery did, as you understand it, was to go to the Pardee job and get a work request before he had done either one of two things which he might have done?

The Witness: Correct. [1523]

Trial Examiner: He either deposit his book or get a temporary working card?

The Witness: Correct.

Trial Examiner: Is it a fact he did that, that he got the work request before doing either one of the two things, the action which subjected him to a fine?

The Witness: The action which subjected him to a fine was to seek work in the area where he was at without clearing into any local in the area or through the council in the District Council. He is subject to a fine or expulsion from the Brotherhood for doing such a thing. The constitution and by-laws states that.

Trial Examiner: Very well.

Q. (By Mr. Heimann): Didn't you tell Mr. Dockery he was subject to a fine for hustling his own job? A. No, I didn't.

Q. At the time you told Mr. Dockery and Mr. Dowdall to put their names on the list, you knew that they had a temporary working card, did you?

A. I did not.

Q. Didn't they show it to you ?

A. I don't remember whether they showed it to me or not at that time.

(Testimony of Robert J. O'Hare.)

Q. Well, you wouldn't have permitted them to sign the list unless they had either deposited their card or paid the [1524] temporary——

A. I told them what they had to do. I didn't see them sign the list. I don't know whether they signed the list at that time. I told them what they had to do.

Q. What did you tell them they had to do?

A. As I stated before, that they had to be cleared through the Council or local to get their names on the list, sign the list.

Q. In other words, they had to be cleared through the local or through the Council before they could sign the list?

* * * * *

The Witness: That's right .

Q. (By Mr. Heimann): You stated that you did not tell Mr. Dowdall and Mr. Dockery that they would be called?

A. They would be called on the phone, what do you mean "called?"

Q. Did you tell them that they would be called if their names come up?

A. I never tell anybody they would be called. No, I didn't tell them they would be called.

Q. What did you tell them exactly, not exactly, as close as you remember about the procedure that was followed in respect to the list, if anything?

A. Same as I have stated before. [1525]

Q. Would you state it again?

A. I told them they were subject to sign the list

(Testimony of Robert J. O'Hare.)

and they should have to be cleared before they could sign the list.

* * * * *

Q. Did you follow—how long have you been with Local 1400? A. About 14 years. [1526]

* * * * *

Q. (By Trial Examiner): Mr. O'Hare, if I interpret your testimony correctly, you have told us that the out-of-work list that the union is currently maintaining week by week is, as you understand, conducted in accordance with the requirements of these particular provisions of the short form contract identified as Respondent Unions' 6 that we have been talking about up to now? [1528]

A. That's correct. [1529]

* * * * *

Q. Now, you testified that it's a practice with which you are familiar that carpenters who are members of other locals may appear at Local 1400 hiring hall and sign your list?

A. That's right, they do.

Q. Are there any conditions attached to their right to sign, do they just walk in and show their membership book and sign or are they required to go through any preliminary procedure?

A. Well, they show that they belong in the Brotherhood.

Q. To what members of the Brotherhood other than members of Local 1400 would that right extend? A. I don't know just what you mean.

Q. I notice here some persons as you pointed

(Testimony of Robert J. O'Hare.)

out who have not indicated any local number as to whom we can draw no inferences. I notice others on Respondents' 7 who have indicated such local number as 1335, 1913, 75, 25, 2375, 1052, 1506, 1478, 583, 2435, 1565, 929, 844, 1052, 1478. Now, if I understand you correctly, persons whose books are deposited in those locals and who are currently paying dues to those locals have the privilege of walking into Local 1400's hall and signing the out-of-work list? A. That's correct. [1533]

Q. Now, before they sign the out-of-work list, what do you require them to establish in order to establish their right to sign?

A. A card, Building Trades card that they received to show that their dues are paid, must show before they go to work a paid up card.

Q. When you speak about a paid up card, what sort of card are you referring to?

A. I hope mine's paid, District Council card, I will show it to you.

Trial Examiner: Let the record show that the witness indicates a small card, approximately the size of a large calling card about three by two in size, bearing a legend indicating, or purporting to show, that it is issued by the United Brotherhood of Carpenters and Joiners of America, American Federation of Labor, Los Angeles County District Council of Carpenters, Robert O'Hare, president, Earl Thomas, secretary-treasurer. On the back, the card states, "Always carry this card. Revocable for cause." And it identifies itself as a quarterly work-

(Testimony of Robert J. O'Hare.)

ing card and has evidence of affiliation with Los Angeles County Building and Construction Trades Council.

Well, then, would I be correct in inferring that all these local members other than Local 1400 which I just read off in the last column of Respondents' 7 for identification [1534] are local members of other locals within the Los Angeles area?

A. That is correct.

Q. So that this reciprocal right of members of the Brotherhood to walk into any member local's office and sign the out-of-work list applies to members of Carpenter locals in Los Angeles County?

A. That is correct.

Q. Would the same right apply to members of locals outside of Los Angeles County?

A. No, they have to have, have to be cleared through the local or Council in the area.

Q. And, by that, you mean they either have to follow the book depositing procedure or temporary working card procedure? A. That's correct.

Q. Now, with respect to this book deposit procedure, we had some testimony here, I believe most of it was given in your absence by Mr. Dowdall upon questions by me as to how this book deposit procedure worked. If I recall his testimony correctly, what it boiled down to was this: He indicated that it was possible for an individual holding a paid up dues book in some local outside of Los Angeles County to come in to Los Angeles County with the fixed intention of depositing it in some

(Testimony of Robert J. O'Hare.)

local here and that if he had that fixed intention at the time he left the area of his old home local, he might have had, or could have had, the appropriate entry releasing, [1535] releasing his book for that purpose made by the appropriate officer of his old home local and that he could present the book in Local 1400 or any other Los Angeles County local with that entry made by the appropriate officer of his old home local.

That is a procedure that you are familiar with?

A. That is called a clearance card, yes.

Q. Now, when an individual has formed that intention before he leaves the territory of his home local and takes care of all this paper work before he leaves the territory of the old home local and comes into your local, what procedure do you follow in order to establish him as a member of your local?

A. He presents the book to the secretary, the secretary looks the book over and if he's a paid up member and presents the book within 30 days from the time of his clearance, he's accepted. The clearance is torn out of it, signed by our local and he's accepted into the local and then we forward the clearance card to the headquarters in Indianapolis that notifies the local that he has left that "Jim Smith" or "Charlie Jones" has cleared into Local 1400, Santa Monica, California.

Q. Now, it also has been testified here that it frequently happens, or may happen, that an individual may leave the territory of his old home local

(Testimony of Robert J. O'Hare.)

without having made up his mind on this matter of depositing his book and he may arrive [1536] in the territory of a local like Local 1400 and make up his mind when there that he wants to deposit his book in Local 1400, but there's been none of the paper work back in the old home local that he would normally be required to undertake. What do you do then?

A. If he wishes to deposit his book in our local and he says that he does, we will take his book and we will forward it to the local in the area where he came from, stating that he asked for a clearance from it and, in the meantime, so he can go to work and he won't lose any time, we give him a temporary working card until such time as the local he's from sends it in there. Also, on top of that, if he has paid three months' dues and those two-months dues are in that local and the months that he's in here, we also ask for them to forward the two-months dues to our local that they are not entitled to because he transferred into our local.

Q. Now, in the first place that I have indicated where the individual has already completed the clearance procedure in the hold home local and he comes to you with the appropriate entries made by the old local's appropriate officers and he indicates a desire to deposit the book in your local, may that individual, if he is out of work, sign your out-of-work list immediately?

A. Upon presentation of the book, yes.

Q. Is there any fee or other charge other than

(Testimony of Robert J. O'Hare.)

the payment [1537] of current month's dues that may be required of him?

A. No, sir, not on that.

Q. Very well. Now, you have testified that if the individual forms the intention of depositing the book after he arrives in your territory——

A. That's right.

Q. ——that for his convenience he may be issued a temporary working card until all the paper work is finished?

A. Providing he gives us his book to send it to the sister local that he comes from.

Q. Is there any charge for issuance of the temporary working card? A. No charge.

Q. Is the individual in that situation entitled to sign the out-of-work list immediately?

A. Yes, he becomes a member of the local automatically because he has declared himself to become a member of our local rather than any other local in the area.

Q. If an individual comes into the territory of a local like Local 1400 and indicates that he has no desire to deposit his book in your local but wishes to hold it in the records of his old home local and maintain dues paying membership there, if I understand the purport of your testimony correctly, he is told before he can sign the out-of-work list he has to get a temporary working card from the District Council? [1538]

A. Yes, get it from the Council.

(Testimony of Robert J. O'Hare.)

Q. Is there any charge for that temporary working card?

A. I think there is a charge of the monthly dues, whatever the monthly dues are.

Q. In the particular local in whose area he wishes to work?

A. No, no, that is the Council, that is the Council.

Q. Now, I don't know whether this may or may not be material but I would like to clear it up for the record for whatever significance it may have anyway.

I think it's generally known and I would certainly assume in that case, unless corrected, that monthly dues payment made to a particular local are divided in your financial administration, part of the money being retained for the benefit of the local and part of it being remitted to the International?

A. That is per capita tax, that is correct.

Q. Is part of the monthly dues payment diverted for the use of the District Council as well?

A. That is correct.

Q. So that, actually, there's a three-way split?

A. That is correct, per capita tax to the District Council, per capita tax to the Headquarters.

Q. Very well. What distribution is made of the fee paid in connection with the issuance of this temporary working permit? [1539]

A. The Council, the District Council has that.

Q. Do they retain the full amount?

(Testimony of Robert J. O'Hare.)

A. As far as I know, retain it for bookkeeping purposes.

Trial Examiner: I have nothing further.

Mr. Nicoson?

Redirect Examination

Q. (By Mr. Nicoson): I now show you again, Mr. O'Hare, Respondents' Exhibit 6 for identification and ask you whether or not the provisions of Section III of that document were in effect at the time you had your conversation with Mr. Dockery and Mr. Dowdall on December 4, 1953?

A. To my knowledge, they were.

Q. I believe Mr. Dowdall testified that you handed him this document, I think we have covered that at the time? A. That is correct.

* * * * *

(The document heretofore marked Respondents' Exhibit No. 6 for identification was received in evidence.) [1540]

No. _____

RESPONDENTS' EXHIBIT No. 6

Date: _____, 195

ARTICLES OF AGREEMENT

ENTERED INTO BY AND BETWEEN _____

hereinafter known as the CONTRACTOR, and the BUILDING & CONSTRUCTION TRADES COUNCILS OF THE TWELVE (12) SOUTHERN CALIFORNIA COUNTIES, hereinafter known as the COUNCIL. For the purpose of clarification, the Twelve (12) Southern California Counties are herein enumerated as follows: Los Angeles, Inyo, Orange, Mono, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo, Kern and San Diego.

I

The CONTRACTOR recognizes the COUNCIL and its affiliated local UNIONS as the sole and exclusive bargaining representative of all employees of the CONTRACTOR on work over which the COUNCIL has jurisdiction, as such jurisdiction is defined by the Building and Construction Trades Department of the American Federation of Labor.

II

The CONTRACTOR, not being signatory to any recognized multiple-employer unit, hereby agrees to accept and be bound by all of the terms and conditions of the multiple-employer unit in effect and as recognized, modified and renewed from time to time through collective bargaining by the COUNCIL and its affiliated local UNIONS.

III

The CONTRACTOR and the COUNCIL agree that in the employment of workmen for all work covered by this Agreement in the Southern California Counties described above, the following conditions and procedure shall govern:

That the Local UNIONS shall establish and maintain open and non-discriminatory employment lists for employment of workmen in the work and area jurisdiction of each respective Local UNION of each particular trade.

That the CONTRACTORS shall first call upon the respective Local UNIONS having work and area jurisdiction, or their Agents, for such men as they may from time to time need, and the respective Local UNIONS, or their Agents, shall immediately furnish to the CONTRACTORS the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the CONTRACTORS.

That the respective Local UNIONS, or their Agents, will furnish each such required competent workman or skilled mechanic entered on their lists, to the CONTRACTORS by use of a written referral and will furnish such workmen or skilled mechanics from the respective Local UNION'S listings in the following manner:

- (a) The specifically named workmen who have been recently laid off or terminated in that respective Local UNION'S work and area jurisdiction by a CONTRACTOR now desiring to re-employ the same workmen in that same area provided they are available for employment.
- (b) Workmen who have been employed by CONTRACTORS in the respective Local UNION'S work and area jurisdiction within the multiple-employer unit during the previous ten (10) years and are available for employment.
- (c) Workmen whose names are entered on the list of the respective Local UNION having work and area jurisdiction and who are available for employment.

That reasonable advance notice (but not less than 24 hours) will be given by the CONTRACTORS to the UNIONS, or their Agents, upon ordering such workmen or mechanics; and in the event that 48 hours after such notice, the UNIONS or their Agents shall not furnish such workmen, the CONTRACTORS may procure workmen from any other source or sources. If men are so employed, the CONTRACTORS will immediately report to the Local UNIONS having work and area jurisdiction, or their Agents each such workman by name.

IV

The CONTRACTOR agrees that workmen employed by the CONTRACTOR or workmen employed by his SUB-CONTRACTOR for a period of thirty (30) days continuously or accumulatively within the multiple-employer unit and procured in accordance with Article III of this Agreement or procured from other sources by the CONTRACTOR or their SUB-CONTRACTOR shall become members of the appropriate craft UNION signatory hereto immediately upon terms and qualifications not more burdensome than those applicable at such times to other applicants of such UNION.

V

CONTRACTORS may transfer workmen in good standing of the six basic crafts from the jurisdiction of one Local UNION to the jurisdiction of another Local UNION of the same craft up to the maximum permitted at the date of this Agreement by the International Constitution and By-Laws of the craft involved, but in any event not more than 10 per cent of the current requirements by crafts on the project to which the transfers are to be made, including a maximum of two foremen in each craft. CONTRACTORS recognize the desirability of employing workmen in good standing of the Local UNION having jurisdiction to the greatest possible extent and it is the intention of the parties that the Local UNION having jurisdiction refers to the work jurisdiction and area jurisdiction of all appropriate craft Local UNIONS affiliated with the COUNCILS covered by this Agreement as such work and area jurisdiction shall continue to be recognized, accepted and maintained.

VI

Workmen employed by any CONTRACTOR, pursuant to the terms of this Agreement, and remaining in good standing in the craft in which they are employed, shall not be removed nor transferred by the UNIONS unless the prior approval of the CONTRACTOR has been obtained.

VII

It is agreed that no employee working under this Agreement need work under any conditions which may be, or tend to be, detrimental to his health, morals or reputation, or cross any picket line, or enter any premises at which there is a picket line authorized by any of the Building and Construction Trades Councils described above as "COUNCIL" or authorized by any American Federation of Labor Central Labor Council, or handle, transport or work upon or with, any product declared unfair by any of such COUNCILS.

VIII

It is mutually agreed by the CONTRACTOR, COUNCILS and their affiliated UNIONS that they recognize the need of Apprenticeship training and to this end shall indenture Apprentices in each of the trades employed, in conformity with Section 1777.5 of the Labor Code of the State of California governing employment of the Apprentices of public work.

IX

Upon all work either performed by the CONTRACTOR directly or performed by his sub-contractor, there shall be no stoppage of work on account of a jurisdictional dispute. If any jurisdictional dispute arises, it must be settled by the UNIONS of the Building & Construction Trades Department of the American Federation of Labor, on whose behalf the COUNCIL has executed this Agreement and the parties signatory hereto agree to comply with the terms of the jurisdictional settlement immediately.

X

This Agreement shall become effective at the date hereof and remain in full force and effect for a period of one year and from year to year thereafter, unless either party has given sixty (60) days written notice to the other party that it desires to terminate.

The parties signatory hereto agree that any modification of the terms of this Agreement regarding payment or the employment of workmen employed by the CONTRACTOR signatory hereto or employed by any of his sub-contractors shall be in full accord with the terms of collective bargaining agreements reached between the UNION having jurisdiction over the work involved and the CONTRACTORS association or trade group with whom each respective Local UNION bargains collectively.

CONTRACTOR OR FIRM:

Los Angeles Building and Construction
Trades Council

532 Maple Ave., Rm. 603
Los Angeles 13, Calif.
MAdison 6-8355

By _____

Street Address _____

City _____ Zone _____

Telephone Number _____

Classification _____

State License Number _____

L. A. VIE, Secretary

Business Representative

Local Union No. _____



(Testimony of Robert J. O'Hare.)

Recross Examination

* * * * *

Q. (By Mr. Heimann): You don't remember any such discussions?

A. I don't remember for sure whether there was or not.

Q. Now, you told the Trial Examiner, correct me if I'm wrong, that the out-of-work list is conducted in accordance with Respondents' 6, is that correct?

A. Insofar as I recollect, yes, sir. [1544]

* * * * *

Q. Did the local in setting up the out-of-work list procedure adhere to the second paragraph in Section III of Respondents' 6? Just read it, if you wish to.

A. Which one is that?

Q. That is the one that starts, "Local union shall establish and maintain open and non-discriminatory employment lists," and then it continues.

A. So far as I know, that is true. [1545]

* * * * *

Q. (By Mr. Heimann): You testified that—no, I will ask another question first.

Would you show us the card again that you showed the Trial Examiner before that a member from another local must show before he can register on the list?

I don't know which is front or back, but on one side it says, "Quarterly working card," is that correct?

A. That is correct.

Q. On the other side, there's a space for the name of the holder of the card, is that correct?

(Testimony of Robert J. O'Hare.)

A. That's correct.

Q. Yours says "Robert J. O'Hare" filled in?

A. That is correct.

Q. And under that there are the printed words, or abbreviations for October, November and December? A. Correct.

Q. And after that there's filled in in ink a date, is that correct? A. That's correct.

Q. And after that there's a stamp at each line "Walter Savage," is that correct?

A. That is correct. [1546]

Q. Would you tell us whether that date on the stamp signifies that you have paid the dues for these months? A. That's correct.

Q. Would you tell us if a member whose card shows that he has not paid the dues for the current months can sign the out-of-work list?

A. If his dues are unpaid?

Q. That's right.

A. No, that isn't true. He has to show his card when his name is called before he gets the work order. He will not get a work order if he hasn't got his dues paid.

Q. I see.

A. If he hasn't got his dues paid he doesn't get the work order. He can sign the work list but—

* * * * *

Q. (By Mr. Heimann): Mr. O'Hare, will you repeat what you [1547] told the Trial Examiner as closely as you remember?

* * * * *

(Testimony of Robert J. O'Hare.)

The Witness: But he doesn't get a work order if he hasn't got his dues paid.

Trial Examiner: Let the record show that the witness' last response was in addition to an answer previously given and interrupted and was given after the record showing his interrupted answer had been read to the witness.

Q. (By Mr. Heimann): Mr. O'Hare, if an applicant for employment isn't a member of any local of the Brotherhood of Carpenters, can he sign the list?

A. Yes, he can.

Q. Does he have to take out a temporary working card?

A. He has to make known a desire that he will join the union within 30 days.

Q. When does he have to indicate that desire?

A. When he signs the out-of-work list.

Q. How does he indicate that desire?

A. He simply tells the man verbally, as far as I know. I have never had the occasion happen but that is my understanding of it. I know he can sign the out-of-work list.

Q. Does he have to take out a temporary working card during those 30 days? [1548]

A. He has to have something to show that he goes there. He pays nothing for it. He gets a card.

Mr. Heimann: May I have the answer read back, please?

(The answer was read.)

The Witness: That is my understanding. I never had the occasion happen.

(Testimony of Robert J. O'Hare.)

Q. (By Mr. Heimann): As far as you remember, that never happened?

A. As far as I know, never happened to me.

Q. Now, you stated that, and correct me if I'm wrong, that if a member does not wish to deposit his book, he must take out a temporary working card and, for that, he pays the dues of the District Council, is that correct?

A. There's no District Council dues. He pays the work permit at the District Council.

Q. And what is that fee that he has to pay?

A. Not more than the monthly dues, the current monthly dues.

Q. The monthly dues of what?

A. Of the local, District Council, whatever they are, the same in all locals.

Trial Examiner: Now I understand your previous answer when you were talking about the dues of the Council in response to an earlier question of mine, you meant the dues charged by locals within that Council's jurisdiction?

The Witness: That's correct. [1549]

Q. (By Mr. Heimann): And you said that the fee for the temporary working card is kept by the Council for bookkeeping purposes?

A. That is my understanding.

Q. That local is credited with it?

A. No local has not part of it at all.

Q. What do you mean by bookkeeping purposes?

A. The time they have to handle it, I suppose, I don't know other than that.

(Testimony of Robert J. O'Hare.)

Q. Do you know whether the Council keeps the fees?

A. I don't know whether the Council sends part of it to Headquarters or not. I don't know what the arrangement is.

Q. I see. You are president of the Council, aren't you?

A. That's right. I still don't do the bookkeeping.

Mr. Heimann: No further questions.

Trial Examiner: I just have one suggested by Mr. Heimann's series of questions.

With respect to your working card, at the time of my original questions, I wasn't interested in exploring the matter of dues payments as a condition precedent to signing the out-of-work list, but since the problem has been raised, I will ask this: You have indicated that an individual holding such a quarterly working card, if it did not indicate dues payments [1550] covering the period of time in which he presented himself in a particular local, he would be permitted to sign the out-of-work list but gets no work order until the quarterly working card shows his dues paid up?

The Witness: For that current month, for the current month.

Trial Examiner: For example, if an individual made monthly instead of quarterly payments and his working card showed dues paid for the month of October and he presented himself during October, he would be entitled to sign the out-of-work list and to get a work order, if I understand you correctly?

(Testimony of Robert J. O'Hare.)

The Witness: That's correct.

Trial Examiner: If it showed dues paid for the month of October and he presented himself in November, he would be permitted to sign the out-of-work list but get no work order until he showed dues paid for the month of November?

The Witness: That's correct. [1551]

TED MORRIS

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Nicoson): State your name for the record. A. Ted Morris.

Q. Where do you live, Mr. Morris?

A. I live at 32660 Whispering Palms Trail, Palm Springs.

Q. California? A. California, yes.

Q. What is your business or occupation?

A. I'm a carpenter.

Q. Do you have any connection with Carpenters Local 1046 of Palm Springs?

A. At the present time I'm trustee.

Q. Did you hold any office with Local 1046 on about the 15th of January, 1954?

A. I was a financial secretary at that time.

Q. Did you hold any office with that local on January 7, 1954?

A. Yes, sir, I was financial secretary.

Q. I hand you a document which is in evidence

(Testimony of Ted Morris.)

as General Counsel's Exhibit 30 and address your attention to the signature in the lower right-hand corner and ask you if you [1552] recognize whose signature that is? A. Yes, sir, I do.

Q. Do you know Clarence Dowdall who is just walking in the room? A. I do.

Q. I will ask you whether or not you were present in the local hall on January 7 when Mr. Adams issued that card to Mr. Dowdall. A. I was.

Q. Who was present besides you and Mr. Dowdall and Mr. Adams, if anyone?

A. Well, there was one that I recall that one that I was talking about, was Leo Cruse. Howsoever, only the fact that he was in there talking to me was the reason why I recall him. However, there were probably 30 or 40 men around there but I don't know just who they were.

Q. Was there a conversation before this card was issued?

A. May I ask a question first?

Trial Examiner: Surely.

The Witness: You say on the 7th of January. I want to get my dates straight. Is this the date or——

Q. (By Mr. Nicoson): This is the date which the card indicates.

A. The card was issued——

Q. I will ask you this, have you ever seen temporary working [1553] cards? A. Yes, sir.

Q. I will direct your attention to the line which is marked "Date 1-7-54." A. Yes.

(Testimony of Ted Morris.)

Q. Do you recognize that as being the handwriting of Mr. Adams? A. Yes, sir.

Q. And that is the——

A. As financial secretary, I check all the books.

Q. And you are positive that is the date on which the card was issued? A. Yes, it is.

Q. Do you know whether or not there was any other issuance of working card to Mr. Dowdall in the month of January, 1954?

A. No, sir, there was not.

Mr. Heimann: May I have the question read back, please?

(The question was read.)

Q. (By Mr. Nicoson): Now, before that card was issued, Mr. Morris, was there any conversation between Mr. Dowdall and Mr. Adams?

A. Yes, Mr. Dowdall came in and asked permission to sign our out-of-work list and Mr. Adams told him that we had, it wouldn't do much good inasmuch as we had better than 60 men on the list out of work then in a small local, around 200 men, [1554] and he said he did not want to go to work but he did want to draw his unemployment which was checked through our local, of course. So Mr. Adams allowed him to sign the working order. He said he had——

Mr. Heimann: I object to what he said about Adams——

Q. (By Mr. Nicoson): Just tell us what was said.

A. After he said he didn't care to go to work, he

(Testimony of Ted Morris.)

said he didn't care if they sent all 65 men out ahead of him, that he merely wanted to get his name on the list so he could draw his unemployment so Mr. Adams allowed him to put his name on the work list.

Q. Is that all the conversation that you recall?

A. He asked Clarence, Mr. Dowdall, is I remember, where his book was and he told him it was still in Alaska. That is one question that I remember.

Trial Examiner: Mr. Adams asked the question and Mr. Dowdall replied?

The Witness: And Mr. Dowdall replied, yes.

Q. (By Mr. Nicoson): Anything further along that line?

A. And he said he did not want to put his book in, that he was merely interested in drawing his unemployment, and so he allowed him to put his name on the list. However, there's a follow up on that I don't think you are interested in right now.

Q. Anything that was said at that time or place? [1555] A. Well, this is——

Q. Go ahead on the subject, go ahead and tell us what it is.

Trial Examiner: When you say "Mr. Adams allowed him to sign the list," describe what he did.

The Witness: Mr. Adams put the work list over there so he could put his name on the list and, roughly, I would say it was somewhere in the sixties, his name.

Trial Examiner: You saw Mr. Dowdall actually writing on the list?

(Testimony of Ted Morris.)

The Witness: Yes, sir.

Trial Examiner: Very well.

Q. (By Mr. Nicoson): Was there anything further said about the deposit of the book?

A. No, he merely asked him where his book was and he said it was, as I recall, he said it was still in Alaska and he did not want to put it in our local.

Q. Anything further?

A. He did make some remark about if he decided to go to work, why, he'd be back to get a working card.

Q. Anything said at that time about a permit, temporary working card?

A. I don't believe I was in on the actual rest of the deal, I mean.

Q. At least, you heard nothing about that?

A. No, it being, as I check his book, naturally, I came upon [1556] it but I didn't have any actual contact with it, as I recall.

Q. Is that all you recall now about what occurred at that time and place?

A. I believe that is all that I recall.

Q. For the purpose of refreshing your recollection, I will ask you to state whether or not anything was said about, by Mr. Dowdall about a case he had in Alaska? Answer that yes or no.

A. Yes, he has referred to that.

Q. What did he say about it?

A. He referred there and every place else, he

(Testimony of Ted Morris.)

said he had beat them, that he didn't care whether he worked or not.

Q. Anything else?

Mr. Heimann: I'd like to have the last answer read back, please.

(The answer was read.)

Trial Examiner: Mr. Morris, you are testifying now to a statement you now recall that Mr. Dowdall made on this occasion when he signed the out-of-work list on January 7th?

The Witness: On that day, yes.

Trial Examiner: That is the only day we are interested in at this time.

The Witness: Yes.

Q. (By Mr. Nicoson): Did Mr. Adams issue this temporary working card while you were there, Mr. Morris? [1557]

A. I am not sure.

Q. Now, did you see Mr. Dowdall a day or so after this occasion?

A. Yes, sir, I did.

Q. Where did you see him?

A. I saw him in Desert Hot Springs.

Q. What was he doing?

A. He was working.

Q. Did you say anything to him about being to work?

A. I never said anything to him. I went over there with Brother Leo Cruse. We talked to the foreman or superintendent about going to work and at that time he told Brother Cruse that, who had spoke to him formerly to come to work the following Tuesday, and he says probably you can go to

(Testimony of Ted Morris.)

work Wednesday, I will have Brother Cruse, who lives very close to me, let you know. However, nothing ever came of it. But at that time, before that ever happened, why, Brother Dowdall was already there and at work.

Mr. Heimann: I'm sorry, I didn't catch the first part of the answer. May I have it read back?

(The record was read.)

Q. (By Mr. Nicoson): Now, after that time and after you saw Mr. Dowdall over on Desert Hot Springs, did you thereafter have a conversation with Mr. Dowdall in which the Alaska case was again mentioned by Mr. Dowdall? [1558]

A. No, I never had any direct conversation with Mr. Dowdall at all after that date or, I really didn't have any conversation with him then, I mean, I was in the office but I did hear him discussing it at the union hall and various other places and as far as that is concerned.

Q. Now, let's——

A. I never, not to me, personally, no, sir.

Q. Now, with respect to the time that you saw him working at Desert Hot Springs and the time that you heard him talking about this thing at the union hall——

A. Yes, sir.

Q. ——how much time had elapsed?

A. Well, when he was talking at the union hall, it was probably, if my memory serves me correct, it was two or three days later that I observed him working in Desert Hot Springs.

Q. Now, maybe we lost contact here. Did I un-

(Testimony of Ted Morris.)

derstand you to say that you heard Mr. Dowdall talk about the Alaska case on more than one occasion? A. Yes, I did.

Q. And the first occasion was at the time he took out the working card? A. Yes.

Q. When was the next occasion that you heard him talk about it?

A. The next occasion I heard him talking about it was quite [1559] some time later.

Q. How much later?

A. Oh, I'd say three months.

Q. Three months?

A. Maybe a little more. Around the 1st of May, I believe.

Q. Where was Mr. Dowdall when you heard this? A. The union hall.

Q. Was anyone else present besides you and Mr. Dowdall?

A. Yes, Brother Art Jensen, the new business agent was there and I don't recall who the others around, like I say, there's always a bunch around.

Q. What did Mr. Dowdall say on that occasion?

A. Well, I don't recall exactly what his description of it was.

Q. Give us the substance as best you can.

A. Well, the only thing was that somebody, I don't know who, had asked him the question, asked about how much money he was going to get out of them and, if I remember correctly, it was something around twenty-five or six hundred dollars that Brother Dowdall estimated that he would get.

(Testimony of Ted Morris.)

Other than that, it was more or less general questioning that I didn't pay too much attention to.

Q. At that time did Mr. Dowdall say anything about going to work?

A. No, he didn't say anything. [1560]

Q. Did you attend any other conversations either at part of them which you overheard Mr. Dowdall talk about the Alaska case?

A. No, not that, not correct, no.

Mr. Nicoson: That is all. You may cross examine.

Mr. Heimann: May I have two minutes, please?

Trial Examiner: O.K. While Mr. Heimann is conferring with respect to cross examination, Mr. Morris, I will ask you about an entry on this temporary working card of San Bernardino and Riverside Counties District Council of Carpenters which you have been shown before——

The Witness: Yes, sir.

Trial Examiner: ——there's a little entry on the side of the card, "\$5.00," a \$5.00, do you know what that \$5.00 represents?

The Witness: No, I don't.

Trial Examiner: On the basis of the testimony already given in this record, let me ask you if it could represent the amount of the local dues charged within the territory of the San Bernardino and Riverside Counties District Council of Carpenters.

The Witness: It could be, our dues are \$5.00 a month.

(Testimony of Ted Morris.)

Trial Examiner: You have no independent recollection with respect to what that particular entry means?

The Witness: No. I mean it is \$5.00 but that doesn't signify anything in that position on the card. [1561]

Trial Examiner: I see.

Cross Examination

* * * * *

Q. (By Mr. Heimann): I see. Now, do you know whether during the time that you were in the office, a temporary working card was mentioned between Mr. Adams and Mr. Dowdall?

A. If it was, I didn't get in on it.

Q. In other words, it might have been mentioned but you might not have heard it?

A. That's correct. [1564]

* * * * *

ROY LEE

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Nicoson): Will you state your name for the record? A. Roy Lee.

Q. Where do you reside, Mr. Lee?

A. 330 Ash, Palm Springs.

Q. In California? A. That is right.

Q. What is your business, your occupation?

(Testimony of Roy Lee.)

A. Carpenter.

Q. Do you have any connection with Local 1046, Carpenters Union?

A. I do, I'm the financial secretary.

Q. Did you have any connection with Local 1046 in and during the month of January, 1954?

A. I was a trustee.

Q. Do you know Mr. Clarence Dowdall?

A. I do.

Q. Have you known him for any period of time?

A. About eight years. Nine.

Q. I will ask you whether or not on or about the 19th of January, 1954, you had a conversation with Mr. Dowdall in your home in Palm Springs? [1572]

A. Yes.

Q. Will you tell us who was present at that time and place? A. My mother and I.

Q. Mr. Dowdall testified in this record that he went to you and told you that he had been offered a job at Desert Hot Springs and that James Adams, the business agent, had told him he would not issue a work clearance to the job and asked you for advice as to what to do. Did any such conversation as that ever take place?

A. No, not that I know of.

Q. Mr. Dowdall testified that you told him at that time and place, "Mr. Dowdall, if you have a job, you go ahead and go to it, go to work. I will see that Mr. James Adams, there's nothing done about it, there will be no fine placed against you for going to work without a written request from him."

(Testimony of Roy Lee.)

Did that conversation take place?

A. I would have no authority to.

Q. Did you ever say anything like that to Mr. Dowdall?

A. I would have no authority to and I never——

Q. Did you have——

Mr. Heimann: I move to strike the last answer as not responsive. The witness didn't state whether he did say it or not.

Trial Examiner: He added just as Mr. Nicoson was beginning his question "and I never." [1573]

Mr. Heimann: I think the proper inference can be drawn from that. I withdraw the motion.

Q. (By Mr. Nicoson): Did at that time and place Mr. Dowdall show you clippings concerning the Alaska case? A. Yes, he did.

Q. Did you have a conversation about it?

A. We did, small one, yes.

Q. Tell us what you said to him and what he said to you.

A. Well, that has been sometime back. He just told me that he is suing the Alaska local and he expected to win his suit and told me why, the reason why.

Q. What did he say?

A. He said that he had been in Alaska, I think approximately eight months and he had bought a home there, a lot. And their rules there, by-laws, say that a member must be there one year in their local before they can be kept on during the winter. So they, the steward, I believe it was, pulled Mr.

(Testimony of Roy Lee.)

Dowdall off and that is why Mr. Dowdall sued the local because he owned his property there.

Q. Was anything else said about the Alaska situation at that time?

A. Well, I don't, I believe several things but I just don't recall how it would come about.

Q. I direct your attention to on or about May 3rd, 1954, and in that connection I show you a document which is in [1574] evidence as General Counsel's Exhibit 31 which purports to be a temporary working card. I will ask you if you have ever seen that card before.

A. Yes, sir, I did, I made it out.

Q. Where were you when you made that card out?

A. In the hall of the office of Local 1046.

Q. What is that address?

A. 339 Radio Road, Palm Springs.

Q. Mr. Dowdall testified that you issued him that card while he visited you in your home on a Sunday. Is that true or not?

A. No, it is not true because I issued this to Mr. Dowdall in the hall and, if it comes down to it, there was one man there at the time.

Q. Who? A. Harold Bayes.

Mr. Heimann: How do you spell that last name?

The Witness: B-a-y-e-s.

Q. (By Mr. Nicoson): I will ask you if at that time and place you issued this card to Mr. Dowdall if you had any conversation with him with respect to him going to work. A. Yes.

(Testimony of Roy Lee.)

Q. Will you tell us what you said to him and what he said to you?

A. I asked him where he was going to work. He told me he didn't know but he met some fellow at the stop sign and the [1575] man says, "I'm going to pour slab. I want you in a few days."

I said, "Where will it be, Desert Hot Springs?"
He says, "I don't know."

Q. Anything else? A. That was all.

Q. Did you have any further conversation with Mr. Dowdall at that time?

A. We walked out on the porch and Bayes was there and Mr. Dowdall was talking about his Alaska deal and said he could do this and that.

Q. What did he say he could do?

A. I don't know what he could, I wasn't very much interested.

Q. Do you remember anything he said?

A. He said, "I have paper to show you that locals can't charge the permits."

And Bayes and he went across to his car and he took out things and showed them and I walked back in the office and 15 or 20 minutes they both pulled away. I was alone in the office.

Mr. Nicoson: You may cross examine.

Cross Examination

* * * * *

Q. (By Mr. Heimann): At the time you issued Mr. Dowdall this document, G.C. 31, did you put the writing thereon?

(Testimony of Roy Lee.)

A. I did, that is my handwriting.

Q. Everything on there except for the G.C. 31 that is in ink?

A. Yes, that is, everything in there is mine except the stamp. [1578] This, I guess I put the "5" there, too, looks like my handwriting.

Q. The \$5.00 looks like your writing. He paid you the \$5.00? A. He paid me \$5.00.

Q. You asked for it?

A. Yes. [1579]

* * * * *

STEPHEN ALBERT MAZUREK

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examintion

Q. (By Mr. Nicoson): State your name for the record. A. Stephen Albert Mazurek.

Q. Spell your last name, please.

A. M-a-z-u-r-e-k.

Q. Where do you live, Mr. Mazurek?

A. Santa Monica.

Q. What is your business or occupation?

A. Carpenter foreman.

Q. Do you have any connection with Local 1400 of the United Brotherhood of Carpenters and Joiners of America?

A. Trustee of the local for the last 15 years.

Q. Did you have any connection with Local 1400 during the month of December, 1953?

A. The same.

(Testimony of Stephen Albert Mazurek.)

Q. How long have you been a trustee?

A. 15 years.

Q. And you are a trustee now? A. Yes.

Q. Do you know a John Dockery?

A. Yes, I do.

Q. The evidence in this case, at least, to the present time is that on December 4, 1953, you were in a conversation or you were at a conversation with Mr. Dockery and Mr. Clarence Dowall who sits across the table? A. Yes.

Q. With that date in mind, I will ask you if before that time you did not have a conversation with Mr. Dockery at your home?

A. Yes, I did, at my house.

Q. And about how long before this time on December 4th was it that you had your conversation with Mr. Dockery?

A. As near as I can remember, a couple weeks.

Q. Who was present at the time you had this conversation with Mr. Dockery at your home?

A. Well, Mr. Dockery and, I don't remember the other guy's name, Tom Rabor or Tabor, something like that. It was a neighbor of his in the Valley. I don't recall the name right now.

Q. Were there just the three of you there?

A. Yes, sir.

Q. All right, you tell us what was said and done at that time and who made what statements, please.

A. Well, I'm going to just say "Doc," [1585] that is what we all know him by, he surprised me by coming to my house because I thought he was still

(Testimony of Stephen Albert Mazurek.)

in Alaska. And he come there for information in regards to going to work.

Q. What did he say about that?

A. He wanted to know what he'd have to do in order to go to work due to the fact that he left his, intended to leave his card in Alaska. In other words, he wanted to come down here and work on a temporary permit for that reason, he wanted to establish residence in Alaska and a little prestige in the local and he couldn't do that if he kept going up and back and forth every spring and coming back in the winter and not leaving his book up there.

Mr. Heimann: May I inquire——

Q. (By Mr. Nicoson): Is that what he said?

A. Yes.

Q. You see, Mr. Mazurek, if you will pardon me, when you say he wanted to do this or explain about this, that doesn't quite give the record—unless you will state what he said, if that is what he said. So as near as you can remember, if you will please try to confine yourself as to what was said and done. You probably can't remember the exact words but you can give us the substance.

A. It's been almost a year but that was the excuse he used, otherwise I wouldn't be sitting here trying to make it out. I tried to help the man as near as I possibly could. I didn't [1586] know the details as to all of that but I was satisfied he had to go through details to go to work at that time.

Q. Did you tell him? A. Yes, I did.

(Testimony of Stephen Albert Mazurek.)

Q. What did you tell him?

A. Again, for further information, I called the representative which was Mr. O'Hare and talked to him and I definitely wanted to find out what he would have to do and I was informed what he had to do.

Q. Did you talk to Mr. O'Hare?

A. Yes, sir, long enough to ask him and tell him.

Q. Just listen to me and take my questions as they come. Did you talk to Mr. O'Hare?

A. Yes.

Q. And what method did you use, by the telephone or personal contact?

A. Over the telephone.

Q. Over the telephone from your home?

A. Yes.

Q. You talked with Mr. O'Hare, what did you say to him?

A. I told him who was at my house and what the man wanted.

Q. What did you say he wanted?

A. Well, I said he wanted to go to work, just pulled in from Alaska and, of course, we have a name for them kind of people, and he wanted to go to work and I told him I explained [1587] what I explained to Dockery. He probably would have to go to the District Council and get a work permit which we could not issue one. He was just, it was their business as far as we are concerned because he did not write down the book to clear in because

(Testimony of Stephen Albert Mazurek.)

he had cleared out that local before he went to Alaska.

Trial Examiner: Cleared out of Local 1400?

The Witness: Cleared out of 1400 and didn't seem fit to want to bring his book down here in order to clear back in again which is our rules according to the constitution.

Q. (By Mr. Nicoson): That is what you told Mr. O'Hare? A. That's right.

Q. What you have just stated, is that what you told Mr. O'Hare?

A. I didn't tell him all of that because I didn't have to tell him, he understands that.

Q. After you talked with Mr. O'Hare, did you tell Mr. Dockery anything?

A. Well, I think I just repeated what Mr. O'Hare had told me on the phone what he would have to do.

Q. Tell us what you told Mr. Dockery.

A. That he would have to go to the District Council and get a working permit from the District Council because we couldn't issue one because he hadn't established residence anywhere in our territory or anywhere in our jurisdiction. [1588]

* * * * *

Q. How long have you known Mr. Dockery?

A. Roughly, I would say about four years.

Q. Now, Mr. Mazurek, in these four years that you knew Mr. Dockery, had you worked with him?

A. Quite a bit of that time, yes.

(Testimony of Stephen Albert Mazurek.)

Q. Had you seen him in and around the union hall on more than one occasion?

A. As far as I can recall, I think only a couple times that I saw Dockery at the local.

Q. Did he attend meetings? A. No.

Q. In that four years that you knew him, did you know of any occasion when he worked out of Local 1400's office?

A. Yes, quite often. He was in our territory because he worked with myself and several of the boys from the local and, naturally, when you get a gang together like that you try to keep them together so, therefore, he was available and he lived out in Reseda—not Reseda, but Agoura, something like that.

Q. I show you a document which has been marked Respondents' Exhibit 7 for identification and ask you to look at it and see if that document, or one similar to it, is familiar to you.

A. It's very familiar but I was just looking for my name on [1589] here supposed to be on here someplace. We see this all the time in the office.

Q. I direct your attention to Page 3, Line 96, and ask you if that is your name on there.

A. Yes, it is.

Q. I want to direct your attention to the top of the page there, the typing in there, which you will see some dates, you notice those? A. Yes.

Trial Examiner: You are speaking about the top of the first page?

Mr. Nicoson: The top of the first page and the

(Testimony of Stephen Albert Mazurek.)

top of the third page. As a matter of fact, the top of all pages except the last one has dates typed on them.

The Witness: December 1 through 8, '53.

Q. (By Mr. Nicoson): And the sheet on which you put your name has the date on the top of it in red ink typed on it, isn't that right?

A. Yes, sir.

Q. Have you ever seen any of those kinds of paper sheets around the office of 1400?

A. Yes, sir, quite a few of them.

Q. Do you know how often they are made up?

A. They are made up every Tuesday morning, 7:30, when we start [1590]

Q. And do you know, all the sheets that you have seen, have they all had a date at the top like that?

A. Yes, sir.

Q. Showing the week for which they are in force?

A. That's right.

Q. That is the usual practice followed so far as you know?

A. Yes, sir.

Q. That's right?

A. Correct.

* * * * *

Q. (By Mr. Nicoson): During the time you [1591] knew Mr. Dockery and he worked out of Local 1400, was that system of the work list such as is now before you, Respondents' 7, was that being used at that time?

A. Yes, sir, it was.

Q. Do you know how long that system has been used?

(Testimony of Stephen Albert Mazurek.)

A. Oh, that's probably been this last six, seven years, quite a while.

* * * * *

Q. (By Mr. Nicoson): During this period of time, this four years you have talked about, have you had the experience with these lists as to how they worked and the routine that accompanies them?

A. Yes, I have.

Q. Will you tell us what that is?

A. Well, for instance, now, here—can't read some of this writing here—but after Tuesday morning, it's when the list is made out and if there's any calls happen to come in from any contractors from this vicinity and wants men, the dispatcher starts at the top of the list and calls the names. [1592] And if they are not there, he keeps on going down until he gets the amount of men called for. Sometimes you get a order for two men, sometimes, they want a half a dozen and sometimes more. And go on down the list until he fills that list with the men that are there at the present time.

Q. Do you know what happens in the event that a man's name is called and he isn't present, what happens to his position on the list?

A. Well, he just stays in that position.

Q. Now, when a man's name is called for an available job, do you know whether or not he is required to take that job?

A. No, not necessarily, if he don't want it, if it's too far.

(Testimony of Stephen Albert Mazurek.)

Q. If he doesn't take the job does anything happen to his position on the list?

A. No, he stays right there.

Q. I believe you stated that system, this list system was in effect during the four years?

A. Oh, yes.

Q. That is what you are testifying about?

A. Yes.

Q. And during the same time which you knew Mr. Dockery to be working in and out of Local 1400?

A. Yes, sir.

Q. I will ask you if you know what the custom and practice is with respect to what the men should do in order to make [1593] themselves available for calls that come in?

A. Well, our office opens down there at 7:00 o'clock in the morning and the men, if they wish, they can come in at that time and wait for the calls to come in which they do as a rule if they are anxious to go to work and want to work.

Q. State whether or not that is a general routine practice.

A. Yes.

Q. Do you know whether or not that is common knowledge among the members?

A. Yes, it is.

Mr. Heimann: I object to the question as calling for a conclusion.

Trial Examiner: The question is whether he knows. Your answer is that you do know?

The Witness: Yes, I know that it's common knowledge.

Q. (By Mr. Nicoson): How do you know that?

(Testimony of Stephen Albert Mazurek.)

A. Due to the fact that it's been in effect so long and quite a few of the locals have sent through that list. I think if you dig them up for the last four or five years, you find everybody's names on it and it's the system we used there and intend to continue using it. We find it's a good system and the majority of the brothers are satisfied with it. [1594]
* * * * *

Q. (By Mr. Nicoson): After you had the conversation with Mr. Dowdall and Mr. Dockery there in the parking lot, did you thereafter see Mr. Dockery on the job, A. Yes.

Q. And where was that job?

A. Well, I can't give you an address of the number. It's Sawtelle and National Boulevard, West Los Angeles.

Q. That is a job on the Zoss Construction Company? A. Yes.

Q. Did Mr. Dockery work on that job?

A. Yes, he did.

Q. Do you recall when he came on the job, about when?

A. I would say somewhere around the first of February, as near as I could recall.

Q. I show you a document which has been marked for the record Respondents' Exhibit 3 for identification and ask you to look at it and see if you recognize what it is.

A. Yes, sir, I do, it's a regular work order. When a man is sent out on the job he brings that out, or a duplicate of it, on the job.

(Testimony of Stephen Albert Mazurek.)

Q. Did you see one of those in connection [1599] with Mr. Dockery's job on the Zoss Construction Company?

A. No, I didn't because they usually are left with the timekeeper. They don't come out on the job.

Mr. Heimann: Will you talk a little louder?

The Witness: I say they do not send it out on the job. They are picked up by the timekeeper or the man that puts down the dope in regard to the man's social security number, address, and all that. Usually stays in the office.

Q. (By Mr. Nicoson): Were you a foreman on that job? A. Yes, sir.

Q. Did Mr. Dockery work under your supervision? A. Yes, sir.

Q. Do you recall that Mr. Dockery left that job sometime later?

A. Yes, he did. I don't recall the date but that is when he quit the job to pack up to go back to Alaska which was——

Q. Did he tell you that? A. Yes. [1600]

* * * * *

HARVEY WRAY

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Nicoson): Will you state your name for the record? A. Harvey Wray.

Q. What is your business or occupation, Mr. Wray? A. Carpenter. [1620]

(Testimony of Harvey Wray.)

Q. Where do you live? A. Palm Springs.

Q. Are you a member of Local 1046 of the Carpenters in Palm Springs? A. I am, yes, sir.

Q. Do you know Clarence Dowdall who sits across the table from me? A. Yes, sir, '44.

Q. Since 1944? A. Yes, sir.

Q. I will ask you if on or about the month of March, 1954, that you had a conversation with Mr. Dowdall in your home? A. Yes, sir.

Q. And who was present besides you and Mr. Dowdall?

A. A friend of mine. He and I were playing gin rummy, Mr. Clyde Wright.

Q. Clyde Wright?

A. He was a member of our local at that time.

Q. Will you tell us what was said there among the three of you and done and tell us who made the statements?

A. Well, Clarence, as we always call him, Mr. Dowdall, he says he wanted to show me some papers and letters. We were playing gin rummy and I told, he wanted to show me some papers he had, this, that and the other, he had in Alaska, a column clipped out of the newspaper, wanted me to read that, this [1621] that and the other, the Taft-Hartley stuff he had and I told him I wasn't interested, to read it himself. So he read a lot of stuff, you know, and one thing and another. So I asked Clarence if he was working and he said, no, he didn't care whether he worked or not.

"Hell," he says, "I can make more money suing

(Testimony of Harvey Wray.)

the locals, make more money drawing unemployment and suing the locals."

That was about the biggest part of it.

Q. Do you recall if anything further was said at that time?

A. Well, he did say that if he got a chance, that our local, that he thought our business agent was using a lot of dictatorship and he would bust it if he could get a chance at it like he was doing 1400. I didn't know 1400, what that is, but I hunted it up in the by-laws.

Mr. Heimann: Would you please read that answer back?

(The answer was read.)

Q. (By Mr. Nicoson): What did he say about 1400?

A. He just said that he was suing 1400. He had a suit against them and had a friend lawyer in Los Angeles looking up his business for him. [1622]
* * * * *

LEO KRUSE

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Nicoson): Give your name to the reporter. A. Leo Kruse, K-r-u-s-e

Q. Where do you live?

A. Palm Springs, California.

Q. What is your business or occupation?

A. Carpenter.

(Testimony of Leo Kruse.)

Q. Do you have any connection with Local 1046 at the Carpenters Union in Palm Springs?

A. Not as of now, sir, no, sir. As an officer, you mean?

Q. No, any connection?

A. I work out of there.

Q. You are a member of that organization?

A. Yes, sir.

Q. Have you been an officer of that organization?

A. Yes, sir.

Q. What officer have you been?

A. Financial secretary. [1637]

Q. When were you financial secretary?

A. In 1952.

Q. I show you a document which has been marked Respondents' Exhibit 5 for identification and direct your attention to the first page thereof, to the signature of the financial secretary. Is that your stamp, is it?

A. Yes, sir.

Q. Was that put on there while you occupied that office?

A. Yes, sir.

Q. Now, I show you another document which, for the purpose of, which is in evidence, I'm sorry, as General Counsel's Exhibit 30 which is the temporary working card of Mr. Clarence Dowdall issued by Mr. James Adams, the business agent of Local 1046 on the 7th of January, 1954. I direct your attention to that date and ask whether or not you were in the union office at the time that card was issued, do you recall that?

(Testimony of Leo Kruse.)

A. I wasn't right in the office. I was right on the outside of the hall.

Q. Standing in the doorway? A. Yes, sir.

Q. Was Mr. Dowdall there? A. Yes, sir.

Q. Mr. Dowdall and Mr. James Adams?

A. Yes, sir.

Q. Mr. Ted Morris? [1638] A. Yes, sir.

Q. And yourself? A. Yes, sir.

Q. Did Mr. Adams and Mr. Dowdall have a conversation about this card?

A. Well, yes, sir, they did.

Q. Will you tell us what Mr. Dowdall said, what Mr. Adams said and what was done, if anything?

A. Mr. Dowdall. I got the impression——

Q. Not that you got the impression, what he said. A. He wanted a temporary working card.

Q. Is that what he said? A. Yes, sir.

Q. Go ahead.

A. So he could draw his unemployment.

Q. Go ahead. Anything further?

A. And Mr. Adams informed him that there was over 60 men, something between 60 to 65, in the 60's, anyway, out of work, that it was not customary to issue temporary working cards to anyone to get a job when we had so many men out of work at home that was paid up men in our own organization.

Mr. Heimann: Just a minute, can I have the answer read back?

Trial Examiner: Read the record, please.

(The answer was read.) [1639]

(Testimony of Leo Kruse.)

Q. (By Mr. Nicoson): Was anything further said along this line, just tell us the complete conversation?

A. At the time I turned and walked outside on the porch.

Q. Did you hear whether or not Mr. Dowdall said anything about going to work?

A. No, sir, he didn't, not that I heard anything about it.

Q. You have known Mr. Dowdall for some period of time, haven't you?

A. Yes, sir.

Q. Worked with him on the job?

A. 1947.

Q. Has he ever discussed with you his participation in the case in Alaska?

A. Well, he had talked about it, yes, sir.

Q. More than once?

A. Yes, sir.

Q. About how many different times?

A. Well, on the job I was on with him, it was constant conversation about it.

Q. And at other times?

A. Yes, he's, yes, sir, about every time I'd meet him, there'd be a discussion about it.

Q. Did he ever talk to you about any lawsuits that he had engaged in?

A. Well,— [1640]

Mr. Heimann: I object to anything about the Alaska case.

Trial Examiner: Objection overruled.

Mr. Heimann: May I have a continuing objection?

Trial Examiner: You may have a continuing

(Testimony of Leo Kruse.)

objection as to this particular conversation. For the record, the objection is overruled.

Q. (By Mr. Nicoson): Did he ever say anything about any lawsuits?

A. Yes, sir, he told me about the lawsuit in Alaska and, also, said he wasn't afraid of them, had in the number of 20's, or something like that lawsuits, standing right up at the saw one day at noon, right after we got through eating dinner.

Q. What was that, about 20 lawsuits?

A. Well, he had more or less lawsuits, gave me the impression that other men was afraid——

Mr. Heimann: Just a minute. May the impression go out?

Mr. Nicoson: That may go out, of course.

Q. (By Mr. Nicoson): What did he say?

A. Tried to impress me, I would think.

Q. What did he say?

A. He said he had a lot of lawsuits.

Q. Did he tell you how many?

A. Around the number of 20, I think it was.

* * * * *

Trial Examiner: On the record.

During the discussion off the record, it developed that Mr. Jensen, the present business agent of Local 1046 is present in the hearing room, but counsel for the respondents has no present intention with respect to calling him as a witness and pursuant to an understanding previously reached during an off the record discussion and for the convenience of the parties, a concensus was reached to the effect that,

upon the invitation of respondent counsel, that he had completed his presentation for the day, we would recess until tomorrow so he could determine the availability of further witnesses for the respondents.

In the light of that understanding and on the basis of Mr. Nicoson's indication that he did not intend to call Mr. Jensen as a witness, I indicated during the discussion off the record that I might wish to call Mr. Jensen as a Trial Examiner's witness. Upon the general understanding which I did not state off the record but now state it that Mr. Jensen, as a responsible official of the union, might be in a position to answer certain inquiries that I have been pursuing with the witnesses who were just on the stand, and for that purpose, in the absence of any indication by the respondents that they wish to call Mr. Jensen as a witness, I'd like to call him since he is here and may not be available at a later date as the trial Examiner's witness.

Mr. Nicoson: There's no objection to that. I might state that one of my reasons for not calling Mr. Jensen was that he was not business agent when these things which have become a part of this case occurred. [1649]

* * * * *

ARTHUR JENSEN

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Trial Examiner): State your name for

(Testimony of Arthur Jensen.)

the record. A. Arthur Jensen, J-e-n-s-e-n.

Q. Where do you live sir?

A. I live in Banning, California.

Q. Do you have any connection with Local 1046?

A. At the present time I'm business agent.

Q. I see. When did you become business agent?

A. I took office July 2nd of this year.

Q. Did you have any official connection other than membership with Local 1046 prior to July 2?

A. Yes, sir.

Q. What was that?

A. I was president of the local.

Q. When did you become president?

A. I became president, well, it was a little over a year. I took the expired term, I was vice-president, then I took the expired term and finished the term for the president who moved away and then I served a whole year as president by being elected.

Q. That was the year just before July 2, this year, when you [1650] were elected business agent?

A. Yes.

Q. During the time that you served Local 1046 as president, was there in use a system of registration or sign up, if I can call it that, on what was known as an out-of-work list? A. Yes, sir.

Q. There has been presented here in this hearing room an out-of-work list for Local 1400 which appears to be a printed form with certain entries added by typing.

Did Local 1046 have a similar form?

A. In the number—may I answer it this way, a

(Testimony of Arthur Jensen.)

few years ago we had a board similar to this and on this board there was a place for a man to write his name and it worked this way here: his name, and when he went to work, that was taken off and every time a man went to work, then this would gradually slide up.

Q. The names below his would be moved up?

A. Moved up and then the last few years we had a form similar to this only we don't have local—it is written on regular paper with Local 1046 stationery with the heading on it and each, there's a place for date similar to this.

Q. In the upper right-hand corner?

A. And each man writes his name down. Number one writes his name there and it goes down just like this form.

Q. The numbers are already written or typed on the sheet, [1651] or does each man put the number in as he puts his name down?

A. Each man puts his number there.

Q. In other words, if he saw the last entry was 16, he puts 17 and signs his name?

A. He puts 17 and signs his name.

Q. Was that system used in the last five months of 1953 and the first three months of 1954?

A. Yes, sir.

Q. So that as Mr. Dowdall testified in this proceeding that on January 7, 1954, he signed the out-of-work list as No. 61, it would mean that he signed a sheet of Local 1046 stationery in No. 61 spot as you previously indicated?

A. Yes.

(Testimony of Arthur Jensen.)

Q. Does the list contain any indication or are the men required to give any indication as to whether they are signing as 1046 members or as members of another unit of the Brotherhood?

A. Well, if a member comes in from any other local, why, which I don't think we have had very many of them, they would have to put their local affiliation on there, their number.

Q. Would they be asked to do that by the person who is handling the dispatching or who has custody of the list?

A. Well, he should do that himself.

Q. The point I'm making is this, Respondents' 7 for identification contains a space on the printed form, a column [1652] headed "Local Number" which most people signing such a list, I assume, would fill in, if they cared to, with the appropriate local number.

A. Local number.

Q. Did you, using a piece of blank stationery, how would the individual from a foreign local know that he would have to put that information down?

A. Well, if the first man usually puts down Local 1046 and then they copy it either with little marks or they write it up.

Q. When you say "little marks," you mean ditto marks?

A. Ditto marks.

Q. Do you have any personal knowledge as to what the employment situation was affecting members of Local 1040 in the first three months of 1954?

A. Yes, sir.

Q. What was your information in that regard?

(Testimony of Arthur Jensen.)

A. Majority, we had a list, that is, from Christmas until the spring months, ranging from 50 to 70 members out of work.

Q. When you say 50 or 70 members were out of work, are you referring to the number of persons signed up on the out-of-work list or other knowledge that came to you from other sources?

A. That is on the list.

Q. Do you have any personal knowledge as to the extent to which persons named on the list were being dispatched with work orders during that three-month period, did you have [1653] occasion to observe the circumstances under which an individual might have been given a work order and sent out on the job from the union hall?

A. Every week we had a new list and if there were men sent out, of course, the ones down below would be up further.

Q. Yes, but were there occasions during the three-month period when you were in the hall and actually saw persons being sent out?

A. Not to my knowledge, no.

Q. Were you yourself working regularly at that time or were you in the hall a good portion of the time?

A. Living in Banning, I don't go down every day. I was working for a contractor and we were doing remodeling and I'd work for him whenever he'd have a remodeling job.

Q. Did you have any personal knowledge at the time that you were president of the union as to

(Testimony of Arthur Jensen.)

the extent to which Local 1046 had contractual arrangements with contractors working in the territory of the jurisdiction of 1046?

A. Well, in all locals it is the arrangement with anybody on this agreement to call to the local for men.

Q. First of all, let me ask this, did you happen to have any personal knowledge as to whether there were contractors currently at work on various jobs in the jurisdiction who did have some sort of an agreement with 1046? A. Yes, sir. [1654]

Q. There has been testimony here not with relation to San Bernardino and Riverside Counties, but with relation to Los Angeles County, Los Angeles locals occasionally they have had agreements with the contractor on what was known as a short form agreement and the example of that which is in evidence here as Respondents' Exhibit 6 refers to an agreement between some individual known as a contractor and the Building and Construction Trades Council of the 12 Southern California Counties hereinafter known as the Building and Construction Trades Council of the 12 Southern California Counties hereinafter known as the Council. Did you use a similar form, did Local 1046 use a similar form in San Bernardino and Riverside Counties?

A. That's right.

Mr. Nicoson: I think you probably inadvertently dropped into a mistake which I sometimes make. I don't think 1046 has any jurisdiction in Riverside County.

(Testimony of Arthur Jensen.)

The Witness: We are under the District Council but we operate as a local union affiliated with the District Council.

Q. (By Trial Examiner): Now, to your knowledge, were there any contractors in the territorial jurisdiction of Local 1046, that is, contractors who had jobs currently running in the jurisdiction of Local 1046 in the latter part of '53 and the first three months of 1954, who were not signed up with Local 1046 or the District Council on this short form agreement?

A. At the present time, I don't know. [1655]

Q. Well, I'm not speaking about the present time.

A. I mean I don't know what the circumstances, who signed or who didn't previous to my being elected and taking over as business agent. I do know now all the members that are signed up.

Q. You say you know now that all——

A. I know all who have signed up and who haven't signed up.

Q. Let me ask you as to your present knowledge in that regard, are there contractors currently working jobs or currently running jobs in the territorial jurisdiction of 1046 who have entered into this short form agreement?

A. Who have signed it?

Q. Signed the short form agreement with whatever District Council or local organization has jurisdiction.

(Testimony of Arthur Jensen.)

A. I'd say the majority of them all have signed it.

Q. Are there any firms that are currently running jobs in the territorial jurisdiction of 1046 who, as far as you know, have established a contractual relationship by signing either an agreement recommended to them by AGC or an agreement recommended to them by BCA but who have not signed the short form agreement?

Mr. Nicoson: I suppose that assumes he knows what AGC and BCA is.

Trial Examiner: Yes, well——

The Witness: AGC contractors and the larger contractors [1656] do not have to sign that. They are already on the agreement. They, if they work in our locality. I might say that there's a number of contractors in our locality that's in the jurisdiction of Palm Springs Local 1046, mostly housing.

Q. Yes.

A. And they are smaller contractors. We have the larger contractors come in on, oh, the road work and some larger, if some larger building comes in.

Q. Yes. As of the present time, speaking, now, about the period since your election as business agent which is the only period you say you have personal knowledge, do you know whether there are any contractors currently running jobs in the territorial jurisdiction of 1046 whose contractual arrangements are governed by the fact that they have signed the contract recommended by the Associated General Contractors, Southern California Chapter,

(Testimony of Arthur Jensen.)

or Building Contractors Association of California?

A. Well, the majority of all of them have signed contracts with us.

Q. I appreciate the fact that a majority may have signed a contract of some kind. I'm trying to get what your personal knowledge is as to the particular contract they may have signed.

A. We have a member agreement and they have signed that.

Q. What is that member agreement, can you describe it?

A. It's an agreement between the Distrcit Council, Local [1657] 1046 with the contractors and they abide by the rules of the local of the unions and working conditions and the hourly pay.

Q. I will ask you to look at Respondents' Exhibit 6 for identification and tell me whether this document you have described as a member agreement is in any way similar to Respondents' 6.

A. Parts of it is similar and parts of it is not. We, in the member, they abide by the master agreement of which this is just articles of the agreement. We have a master agreement and when they sign our form, why, they are supposed to abide by the master agreement which is a lengthy agreement.

Q. I see. Now, have you ever seen the so-called master agreement? A. Yes, sir.

Q. I show you two documents which have been received in evidence previously in this proceeding and ask whether either or both of these are the master agreement to which you have referred.

(Testimony of Arthur Jensen.)

A. AGC agreement.

Trial Examiner: Let the record show that the witness gave his answer by looking at the cover. I think in fairness to the witness he ought to be asked to look at the contents as well.

The Witness: Well, I didn't think anybody'd be pulling tricks in here. [1658]

Trial Examiner: Let the record show that the witness has inspected the exhibit identified as the AGC-AFL master labor agreement.

Q. (By Trial Examiner): Is this the master agreement to which you say the contractor indicates that concurrence by signing the member agreement that you have spoken of?

A. Yes, sir. We also have one typed out.

Q. You also had one what typed out?

A. Master agreement.

Q. Similar to this?

A. Large sheets of paper with about, I imagine, a dozen sheets.

Trial Examiner: Let the record show that the witness' last answer was given after I had held up for his view the AGC-AFL master labor agreement received in evidence as G.C. 3.

Q. (By Trial Examiner): Do you have any personal knowledge as to whether there are at the present time operating within the territorial jurisdiction of Local 1046 contractors who have in some other way indicated their agreement to be bound by the AGC-AFL master labor agreement without

(Testimony of Arthur Jensen.)

signing the member contract that you have previously spoken of?

A. Well, the ones that are working there that have signed the AGC agreement.

Q. I'm talking about, are there any firms that signed elsewhere under any other circumstances without actually [1659] signing a piece of paper for you?

A. Yes. That is contractors from out of our territory that come in.

Q. How do you find out whether or not they have signed elsewhere or whether they should be asked to sign the member agreement?

A. There is a list, AGC contractors, general, and their buildings are published and we have a book similar to this, a little bit larger, and they are alphabetically in there, and all you have to do is find their names and look it up and it tells you what they are.

Q. Now, this other booklet which I have shown you has been received in evidence earlier in this proceeding as General Counsel's 19 and it purports to be an agreement negotiated by the Building Contractors Association of California with various labor organizations and recommended for signature to members of that particular trade association.

Have you ever seen this particular booklet before? A. I don't have it down there.

Q. Do you happen to have any personal knowledge as to whether any of the contractors operating in the territory of Local 1046 have indicated

(Testimony of Arthur Jensen.)

their intent to be bound by the master labor agreement to which you have referred by giving some sign of assent to this organization, the Building Contractors Association rather than AGC, do you have any [1660] knowledge on that score at all?

A. Well, I think they have to qualify to be AGC contractors.

Mr. Heimann: May I have the answer?

Trial Examiner: "I think they have to qualify to be AGC contractors."

The Witness: They have to be licensed.

Q. (By Trial Examiner): I will state for your information there's testimony in this hearing some contractors operating in the 12 Counties may not be AGC members but may be members of another trade organization of contractors known as Building Contractors Association of California. A. Yes.

Q. And there is testimony in this proceeding that such contractors who are not AGC members would not be listed in any roster or AGC members, of course, and would, if they intended to be bound by this so-called master labor agreement in any way at all have given some sign of that intent to be bound to their own trade associations, the Building Contractors Association of California. I'm asking you whether you know of your own knowledge whether any contractor currently working in the territorial jurisdiction or Local 1046 have established their willingness to be bound by the contract through this organization rather than through AGC, do you know whether that is the fact?

(Testimony of Arthur Jensen.)

A. I don't know whether willingness—— [1661]

Q. Have——

A. ——they have signed up. This book I referred to, it tells if they are in the AGC agreement or BCA or general.

Q. I see, it distinguishes?

A. It distinguishes, yes.

• • • • •

Q. (By Trial Examiner): Mr. Jensen, I show you a document which is not yet in evidence in this proceeding but which has been marked for identification as General Counsel's 17. I will ask you if you have ever seen this document or one identical with it before.

A. I have never seen one like this before.

Q. I see, when you spoke about a list of AGC members, then you were not referring to any document that looks at all like this one? A. No, sir.

Q. Mr. Jensen, I show you a document which has been received in evidence in this proceeding as General Counsel's Exhibit 23 and I ask you if you have ever seen a document like this before.

A. Well, similar to this. Every time a contractor signs up, we get a list of them.

Q. Do you know where that list comes from?

A. No, sir. [1662]

Q. Who do you get it from?

A. Well, it would come from the District Council of Los Angeles, I imagine. I think that is where it comes from.

Q. The Los Angeles District Council or San

(Testimony of Arthur Jensen.)

Bernardino and Riverside Counties Council, I mean the particular copy that you get is what I'm interested in.

A. I was trying to figure. Probably Willie Howard sends it out.

Q. Who is he?

A. Business agent for District Council of Riverside and San Bernardino.

Q. Aside from the fact you get it from him, you don't know where it originates, if I understood your last answer correctly?

A. That's right. I could look it up. [1663]

* * * * *

Cross Examination

Q. (By Mr. Nicoson): Mr. Jensen, this book that you talk about which has the AGC and BCA members that you received, do you have any knowledge or not that is is union publication?

A. No, sir, it has a heading on it just, I think, similar to that.

Trial Examiner: Let the record show that the witness indicates G.C. 3.

* * * * *

Q. (By Mr. Nicoson): Is it typed or printed?

A. It is printed.

Q. Similar to G.C. 3 that you have there?

A. Yes, sir.

Q. Similarly bound in a little black book?

A. Just like this, the book is a little larger.

Q. All right. I have never heard of it before.

(Testimony of Arthur Jensen.)

A. I can look up the contractors in 11 southern counties of California.

* * * * *

Q. (By Mr. Heimann): And besides that book of AGC contractors, you have a list similar to what the Trial Examiner showed you which is G.C. 23?

A. The reason of the listing is at the present time they are negotiating for this health and welfare and when they go into Los Angeles, here, why, we receive who is signed up.

Q. Who has signed what, the AGC contract or BCA contract or both?

A. Any contractor, our contract.

Q. What I mean is, does that list both AGC contractors and BCA contractors, if you know?

A. The present one doesn't but I understand that we will. [1665] It's supposed to come out who they belong to, be published. Each local will have it.

Q. Mr. Jensen, is it your understanding that if any contractor is listed in the black book or on the list which is similar to G.C. 23, that he is not required to sign a short form agreement or member of agreement with the local?

A. I couldn't answer that.

Q. Is it your understanding that the persons that are listed in the black book or on that list are, have signed or are bound by the master labor agreement, either the AGC or the BCA master labor agreement?

A. Yes, sir.

Q. Do you know whether at any time contractors

(Testimony of Arthur Jensen.)

that are located not within the jurisdiction of Local 1046, for instance, contractors that are located in Los Angeles have jobs within the jurisdiction of Local 1046? A. That's right.

Q. And in such cases does the local check the little black book or the list to see whether they are signatory to the master labor agreement?

A. If they are, if a contractor comes in, the first thing he does is contact the Local 1046. That is, if he's needing men which, if they come down here, they will have to and as an outside contractor always abide by our agreements and our by-laws.

Q. Does Local 1046 then ask the contractor to sign a contract? A. No, sir.

Q. Does your answer apply regardless of whether such contractor is listed in the black book or on the list or not?

A. If a contractor comes down there and he's not on this list and he's going to do quite a bit of building, if he's not on any agreement, I would ask him, due to our health and welfare plan——

Q. You would ask him what?

A. ——to sign the contract.

Q. And if he is on any of these lists you would not ask him to sign a contract?

A. No, if he's previously on a contract in Los Angeles or someplace else, I wouldn't ask him.

Q. Now, that out-of-work list that is kept by Local 1046 which the men sign up, is that renewed from time to time?

A. That is changed every week.

(Testimony of Arthur Jensen.)

Q. Every week?

A. Yes, sir. I think that is required by the unemployment office.

Q. The unemployment compensation office?

A. Yes, sir.

Q. Do you know whether the unemployment compensation office checks with Local 1046 as to whether applicants for unemployment [1667] compensation are registered with Local 1046 or have signed the out-of-work list?

A. When a man applies for unemployment why, he brings the card to the office and on that card there——

Q. Just a minute, what card?

A. The unemployment, from the unemployment office that they have a card.

Q. I see.

A. And on this card there's a place for their number on the list. It's printed in there. And when I fill out a card, why, there's a number of questions, if he's asked for unemployment, or for employment, I just forget what all the rest of them are. I think there's about four questions and then the number on the list.

Q. You mean the number that the man has on the out-of-work list?

A. Yes, sir.

Q. Do you know whether the unemployment compensation office sends men up in order to have that space on the card filled out?

A. They could not receive their allotment if that was not filled out properly.

(Testimony of Arthur Jensen.)

Q. Do you sign the card, too, or initial it?

A. Yes, I sign it and stamp it with the local seal.

Q. Now, you stated that if a member of a stranger local signs the out-of-work list, he is supposed to put the number [1668] of his local down, is that right?

A. Yes, but I have never seen that. We have never had any members like that come in and sign that way. When they come down and find out we have 70 men out of work, why, they keep on going.

Q. You say a new list is made up every week?

A. Yes, sir.

Q. When is that day of the week?

A. Monday morning.

Q. Monday morning. If a member of a stranger local would come in on Monday morning, the time the office opens, there wouldn't be 70 members on the list then, would there?

A. By changing every week, if men were sent up the new list would be, since we have to write it out, why, a member like, say, No. 5 would be No. 1 if that many men were sent out, then everybody just rotated up.

Q. I'm not sure if I get that. Now, a new list is made out every Monday?

A. Also, here, you might say this man No. 18, he might be discouraged and clear out. Then, this would be marked off.

Trial Examiner: His name would be marked off?

The Witness: His name would be marked off.

(Testimony of Arthur Jensen.)

Or we had two or three transfers or if they didn't show up for a week or for some reason or another, then all of these names would automatically go up. They do not lose their standing. [1669] I mean it doesn't shake them up and change them any way. They automatically go up.

Trial Examiner: If I understand you correctly, Mr. Jensen, what it amounts to is if the old list from last week resulted in five men going out on work orders so that the No. 6 man was still looking for work, the list that you would make up on the following Monday morning would show that the No. 6 man, if he was still interested in a job in your territory, was No. 1 man on the new list?

The Witness: That would be No. 1.

Trial Examiner: And an individual, if the old list contained 60 names and only five of the 60 had gotten jobs during the last week so that there were now 55 members interested in looking for work on Monday morning, if a member of a stranger local came in on Monday morning, he would have to sign up as No. 56?

The Witness: That's right.

Q. (By Mr. Heimann): In other words, on Monday morning the members don't have to, the members that were on the previous list don't have to be first in the office on Monday morning in order to get the old place on the list is that right?

A. Well, if they are interested in work, they will be there if their name is toward the top, they are certainly there. They are union members and

(Testimony of Arthur Jensen.)

abide by the union rules and regulations that we have. [1670]

Q. I understand. Let's say a man in No. 5—at what time do you open the office on Monday morning? A. I open at 7:00 o'clock every day.

Q. At 7:00 o'clock. Now, if that man who is No. 5 doesn't come in at 7:00 but he comes in at 7:15 and some others who have a lower place in the list are there at 7:00 o'clock, the man who was No. 5 on the old list wouldn't lose his place, would he?

A. I would call his name and if he wasn't there, why, I take it—that is just like if I asked if a man is there if he's qualified or wants the job to go out on the job. He does not lose his place on there because there's some work that some men do not want. Also, there's men that do not want to work for certain contractors and they have the privilege of refusing but they do not lose their place on it.

Q. Let me ask this, when you make up a new list on Monday, that is not made up in the order in which the men show up at the office on that Monday, is it?

A. That, different locals have different rules.

Q. I'm talking about 1046.

A. In 1046 we have an out—Jimmie Adams' way, and that is make out the list as it was previous.

Q. And it's made up as it was previous with the exception of those who have gotten work and the exception of those who don't show any more interest in the work? A. Yes. [1671]

* * * * *

Testimony of Arthur Jensen.)

Q. Do you know what the practice was in regard to the issuance of temporary working cards in January, 1954? A. Yes, sir.

Q. Would you tell me whether a member of a stranger local had to take out a temporary working card before he could sign the list?

A. All members that take, join the Carpenters local take an oath and they should know all the rules and regulations of that and it states definitely in a book that a man coming in from another local, he is required to take out a work card.

Q. And did the local, if you know, require a member of the stranger local to abide by that part of the constitution before he could sign the out-of-work list? A. Well, I don't know, sir.

Q. Pardon? A. I don't know.

Q. You don't know. And you don't know what the practice in regard to that was in January, '54?

A. The practice, I imagine the practice would be to live by our by-laws and that would be the answer to the issue. [1672]

Mr. Heimann: I have no further questions.

Q. (By Mr. Nicoson): Mr. Jensen, you were asked by Mr. Heimann in respect to the issuance of a temporary working card when a stranger comes into your jurisdiction, do you recall that?

A. Yes, sir.

Q. Now, suppose this stranger who is a member of the union deposits his dues book with the local, would he then be required to take out a temporary working card?

(Testimony of Arthur Jensen.)

A. No, if the book is placed or paid up and in good order, why, he automatically gets a work card or his regular union card. It's the only way we can tell when a member comes into a local is through his book.

* * * * *

Q. (By Mr. Nicoson): Now, you were questioned by Mr. Heimann with respect to a card which comes to you from the unemployment compensation office. Do you remember that testimony?

A. Yes, sir.

Q. I hand you a document which, for the purpose of identification, has been marked Respondents' Exhibit 11 and ask you if this is such a card.

A. This is a card that I sign when they, [1673] before they go to the unemployment office to collect their money. They have one other card they bring and these are sent to the local union for the business agent to fill out. They bring their card.

Q. Who brings their card?

A. That is the unemployed carpenter.

Q. All right.

A. He brings his card and I take the social security number off that, print his name here, put his number where he is on the list and sign, date it and sign it, put my stamp on.

Q. Up in the upper left-hand corner on this document, you write the social security account number, you insert the applicant's account number there?

A. Yes.

Q. And in the right-hand corner there is printed

(Testimony of Arthur Jensen.)

“Claimant’s Name” and a line and you put the applicant’s name there? A. There.

Q. And below there, there’s also, another blank and “Date,” and you put in there the date on which you sign that card? A. Yes, sir.

Q. And you sign it where it says “Validating Officer’s Signature,” right? A. Yes, sir.

Q. And below that there’s a little box which says “Union Stamp” and you affix the union stamp there, right? A. Yes. [1674]

Q. Directing your attention again to the upper left-hand corner of this document and, particularly, to the words which read, “During the seven-day period ending” and a blank, there’s a blank line there, do you see that? A. Yes.

Q. Do you know what that means?

A. Yes, sir.

Q. What does that seven-day period mean?

A. Before they can, there’s a period of waiting before they draw their unemployment.

Q. Yes.

A. And when they have put in their time or waited the seven days, or the required number of days that is stamped on the card that they bring to me and the days, that is, the day they are supposed to appear back to the office which would be the week ending, and I will take that off their card, put it here and the day they bring it in, I put there.

Q. You say, “I put here and I put there” and nobody can tell when reading——

A. During the seven-day period, the above

(Testimony of Arthur Jensen.)

named member of this local union has, then I put, I take that off of the card that has come from the unemployment office.

Trial Examiner: That is, you fill in the appropriate date by referring to the card that the individual brings from the unemployment compensation office? [1675]

The Witness: Yes.

Q. (By Mr. Nicoson): Now, do you fill out the rest of the blanks on that card? A. Yes, sir.

Q. Let me address your attention to the item which is No. 1 which reads "Been eligible for referral to work by this union, yes or no."

Do you answer that question? A. Yes.

Q. Where do you get the information for that?

A. I ask the men in——

Q. All right.

A. All six questions, I ask the men.

Q. Do you make any inspection with respect to No. 2, whether or not he has been registered for work with your local union?

A. Yes, sir. If his name is not on the list, I'd have to put "no" on it.

Q. What list are you now referring to?

A. I'm referring to the unemployment list of the Carpenters.

Q. The work list? A. Work list.

Q. One like Respondents' Exhibit 7 before you?

A. Yes, sir.

Mr. Heimann: May I ask to what question [1676]

(Testimony of Arthur Jensen.)

he answered "No," if the applicant is not on the list?

Trial Examiner: Second.

Mr. Heimann: Second.

Q. (By Mr. Nicoson): On this card after each of these numbers, there's a place that you answer yes or no, isn't there, a space for which you can write the answer? A. That's right.

Q. And you fill all this information out either from what you have in your office or what you obtain from the applicant, is that so?

A. Yes, sir.

Q. Directing your attention to Item No. 7, it says, "Position on board list number," blank. Now, what happens when you fill that out, where do you get your information about that?

A. The unemployment list of the Carpenters.

Q. That is the work list?

A. The work list?

Q. Like Respondents' 7 now before you?

A. Yes, I take it off of there.

Q. And you take the number that he has his name on that and insert it into that blank space?

A. Yes.

Q. After you have done all that, what do you do with it?

A. I hand it to the member and he takes [1677] it down to the unemployment office. He could not receive his money unless he had this card.

* * * * *

(Testimony of Arthur Jensen.)

(The document heretofore marked Respondents' Exhibit No. 11 for identification was received in evidence.)

* * * * *

Q. (By Mr. Heimann): I'm not sure if [1678] you stated whether you knew whether there were contracts or so-called master labor agreements with BCA and AGC contractors prior to May, 1954.

Do you know anything about that whether there were such master labor agreements?

A. Well, sure. [1679]

* * * * *

Mr. Heimann: I have previously identified as G.C. 32 the By-Laws and Trade Rules of the San Bernardino and Riverside Counties District Council of Carpenters and Joiners of America.

Mr. Nicoson, do you stipulate that that document represents the by-laws and trade rules of that District Council?

Mr. Nicoson: Oh, yes.

Mr. Heimann: And at all times material in this case?

Mr. Nicoson: I do.

Mr. Heimann: I now offer G.C. 32 in evidence.

Mr. Nicoson: No objection.

Trial Examiner: Very well, G.C. 32 will be received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 32 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 32

BY-LAWS AND TRADE RULES

(Cut of United Brotherhood of Carpenters and
Joiners of America)

Organized February 13, 1949

San Bernardino and Riverside Counties District
Council of Carpenters and Joiners of America

Approved April 16, 1953

Approved by J. R. Stevenson

First General Vice President

* * * * *

Trade Rules

Article 1

Section 1. Members coming into the District Council's jurisdiction shall obtain a San Bernardino and Riverside Counties' District Council working card or permit before seeking employment. Failure to comply with this section will be fined not less than twenty-five dollars (\$25.00). After being duly tried and convicted and must at all times be governed by the General Constitution and the Trade Rules of this District.

* * * * *

Article 2

Section 3. All members in the jurisdiction of this Council shall be given the opportunity of being employed before calling outside Locals for men. No Local in this District Council shall require a transfer of membership or charge a permit fee of a member of another Local affiliated with this District Council. Members of any Local Union in this Dis-

trict shall obtain a referral card from his respective Local, and present same to the Business Agent of the Local Union in whose jurisdiction he desires to work before going to the job or be subject to a fine of one day's pay. * * * * *

Mr. Heimann: Calling particular attention to Pages 17, 18, 25, 27, 28 and 29, 36 and the insert in the center of the booklet.

* * * * *

Mr. Heimann: I have now had marked as General Counsel's 41 for identification a document.

Mr. Nicoson, do you stipulate that that document is the "Constitution and Laws of the United Brotherhood of Carpenters and Joiners of America and Rules for Subordinate Bodies Under Its Jurisdiction," that it was in effect at all times material in this case? [1689]

Mr. Nicoson: I so stipulate.

Mr. Heimann: I now offer that document in evidence.

Trial Examiner: I gather there is no objection.

Mr. Nicoson: No objection.

Trial Examiner: General Counsel's 41 is received.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 41 and was received in evidence.)

Mr. Heimann: I call attention to Pages 39, 40 and 60 of that document.

I have now had marked for identification as G.C. 42 a document and I ask Mr. Nicoson if he stipulates that that document represents the "By-Laws

and Trade Rules" of the Los Angeles District Council of Carpenters that were in effect at all times material in this case.

Mr. Nicoson: I so stipulate.

Mr. Heimann: I now offer that document in evidence.

Mr. Nicoson: No objection.

Trial Examiner: Very well, General Counsel's 42 will be received.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 42 and was received in evidence.)

Mr. Heimann: I call particular attention to Pages 19, 20, 21, 22, 23 and, again, an insert in the center of the booklet which appears in a yellow or buff color. [1690]

* * * * *

Mr. Nicoson: Mr. Savage, will you take the stand, please?

WILLIAM J. SAVAGE

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Nicoson): State your name for the record, please. A. William J. Savage.

Q. Where do you live, Mr. Savage?

A. 1507 South Dunsmuir, Los Angeles 19.

Q. What is your occupation?

A. I'm financial secretary and dispatcher for Carpenters Local 1400 in Santa Monica.

(Testimony of William J. Savage.)

Q. What is the dispatcher job that you have?

A. Dispatcher job is that I dispatch the men to the various jobs when the contractor called for them.

Q. What do you mean, "dispatch men"?

A. Well, I send the men to the job whenever contractors call in for the men.

Q. You tell us the whole rigmarole that you go through, will you, please?

A. Well, we have an out-of-work list at the union that is numbered. Each page is numbered, I believe 33 names on each [1695] page, and these men that are out of work come in and sign that work list for work. It's designated on a corner of the work list "Rough" or "Finish" or whatever type of work they do. When I get a call from a contractor for a man or a certain number of men, then I take that list and go down the list and call out the names until I fill the job.

Q. Tell us a little more about this contractor's call. How do you get those calls?

A. I get them by telephone, over the telephone. The contractor will call in.

Q. Just assume we know nothing about it which is probably the truth and tell us just what it is that happens.

A. Well, the contractor will call in and he will ask if this is the Carpenters Union and I say "Yes."

He'd say, "All right, I have a job at such and such address. I need two man for framing or two men for finish," or whatever number of men it is.

(Testimony of William J. Savage.)

I take the contractor's name, the address of the job. I tell him I will have the men out there.

Then, I go to the work list and call off the names from the work list until the job, the man's name comes up that wants the job and is crossed off the work list and he's dispatched to that job.

Q. When you call off these names, who do you call them to?

A. I call them to the men that are waiting in the hall for [1696] work.

Q. Then you start down from the top of the list, call from the top down until you succeed in filling out the request for men that the contractors have called in for? A. That is true.

Q. Is that the way you handle it?

A. That is true.

Q. I show you a document which, for the purpose of identification, has been marked Respondents' Exhibit 7 and ask you to examine it and state whether or not that is one of the out-of-work lists of Carpenters Union No. 1400?

A. That is an out-of-work list of Carpenters Local 1400.

Q. Do you have anything to do with the preparation of that list? A. Yes, I do.

Q. What do you have to do with it?

A. I type, get these lists out. I mark them as Sheet 1, 2, 3, whatever the case may be. I place on there the date that the sheet is made up to the date that the sheet would expire.

Q. What do you mean "expire"?

(Testimony of William J. Savage.)

A. Well, we make up a new sheet every Tuesday morning at 8:00 o'clock, or a new sheet goes into effect at 8:00 o'clock every Tuesday morning and so from Tuesday to Tuesday, that is the way the sheet is dated. And then, of course, I number [1697] them, the sheets, in other words, the lines here.

Q. Let me call your attention, then, to the portion of the document which appears to have been put on there by typewriter with a red ribbon.

A. Yes.

Q. Do you see that? A. Yes.

Q. Who puts that on there? A. I do.

Q. You put the date on top of the sheet each week for the week it covers, is that right?

A. That's right.

Q. Then you make out the numbers for each of these lines? A. That's right.

Q. Do you know whether or not you make up one sheet each week?

A. Well, yes. I usually make, I've been making up three sheets for quite a while.

Q. Why do you do that?

A. Usually, there's anywhere from the first day that a new sheet is called, or made up, I would say that there's on an average generally a page to a page and a half and, of course, you figure there's going to be more men to come in to sign that list in the period of a week. And if I would need more than three sheets, I make those up too during the week.

(Testimony of William J. Savage.)

Q. When you make the sheet up for a new week which I believe [1698] you have stated goes into effect each Tuesday morning—

A. That's right.

Q. —you probably make that up the day before?

A. I make that up generally on Monday afternoon.

Q. When you make it up do you put any names on there? A. No, sir.

Q. After you have made it up, typed it, put the date on it and put the numbers on the side of the page, what happens to it then?

A. Well, the sheet that is being used at that time is placed on the counter top of the window at the office where the men come up and sign the sheet.

Q. At what office?

A. My office at Santa Monica Boulevard.

Q. Now, there's some testimony in this record that you required the employees who want to get on that sheet to appear and sign it each Tuesday morning? A. That is true.

Q. Or whenever they want to sign it?

A. That is true.

Q. Is it also true—have you had any experience with the sheet, over what period of time have you had experience?

A. It would be about four years coming next month.

Q. In the handling of that sheet, in your expe-

(Testimony of William J. Savage.)

rience have you found that men from other locals than 1400 signed your sheet? [1699]

A. Yes, sir, they do.

Q. And, also, from your experience, have you learned and do you know that men sign similar sheets with other locals throughout Los Angeles County?

A. Yes, that is true. They have the privilege of signing with any local union in the county.

Q. And they avail themselves of that privilege?

A. They do, yes.

Q. And you have the requirement of coming in and signing each Tuesday morning? A. Yes.

Q. Why do you do that?

A. Well, one of the reasons is, I think that it is more or less a requirement of the Department of Unemployment that they sign these. They have their name registered with the union, who they are affiliated with and been available for work.

Q. Are there any other reasons?

A. Well, it's been the practice of the Carpenters to have this out-of-work sheet for the convenience of these men who come in and register when out of work so they can be dispatched to work.

Q. Let me ask you this, suppose, as that sheet indicates, directing your attention particularly to Line 24, the name W. H. Wells, in the extreme right-hand corner appears the figure of 1913. [1700]

A. Yes.

Q. What does that 1913 mean?

A. That 1913 is another local union.

(Testimony of William J. Savage.)

Q. Another local union? A. That is true.

Q. Do you know where it is located?

A. 1913, I believe is in Van Nuys.

Q. Van Nuys, all right. Do you have any communication or system by which you would know whether or not, come next week, Mr. Wells, had obtained a job through Local 1913 or one in Redondo Beach or someplace else?

A. No, I wouldn't know that. I would have no way of knowing that.

Q. And does that have anything to do with the requirement of people coming in every Tuesday?

A. Yes, it does. These fellows can go, as I said before, to any local union and they could possibly been dispatched with some other local union and they would be on my sheet for the end of that week and, therefore, on Tuesday morning obtained work someplace else and, naturally, wouldn't be available for work, wouldn't be available on the new sheet.

Q. Then you have two requirements that they sign the sheet each week to renew acknowledgment to you of their availability——

A. That is true.

Q. ——and also so that you can be governed accordingly and, [1701] I take it, you won't have a list of tremendous numbers of the names that you don't even know whether they are interested in employment or not?

A. That's right, that is correct.

Q. Now, there's been some testimony in this record about the permit system which the Carpenters

(Testimony of William J. Savage.)

locals have. Have you had any experience with the permit system?

A. Well, yes, I have had a little. I had, a fellow comes in with a book from maybe some other local union or from out of state or any other place and he has a clearance in his book. Then, if he wishes to deposit his clearance, then, he is given a permit until his clearance can be cleared through the local union.

Q. What do you mean he is given a permit so he can be cleared through the local union?

A. He is given a permit to work while his book is being cleared through the local union.

Q. Is there any charge for that permit?

A. No, sir.

Q. I show you a document which has been marked for identification as Respondents' Exhibit 5 and ask you if that appears to you to be a dues book commonly in use by the members of the United Brotherhood of Carpenters and Joiners?

A. Yes, sir, that is. That is the dues book of the United Brotherhood of Carpenters and Joiners of America. [1702]

Q. I direct your attention to the back of that book where you will see perforated pages. Are those the clearance sheets that you are talking about? A. That is true.

Q. I believe the Trial Examiner heretofore has described those pages for the record and those are what you call the clearance sheet?

A. That is true.

(Testimony of William J. Savage.)

Q. When a member comes in from a foreign local, that is, a local other than your own, to work in your jurisdiction, you have what sometimes is referred to as the depositing of the book routine, is that right?

A. That is true.

Q. All right, tell us about that?

A. Well,——

Q. How is that done?

A. Well, a member brings his book in, similar book to this, with a clearance made out by the local union.

Q. That is one of those perforated sheets?

A. That is true.

Q. By the local union in which he holds the card?

A. That is true.

Q. In which the book is deposited?

A. That is true. It is——

Q. Go ahead. [1703]

A. It is made up stating that the clearance that the local union makes up that the man is a member in good standing and has his current dues paid for whatever month had been paid. It would have to be the current month and that he has been issued a clearance. In other words, he is in good standing. Clearance is all right and in good standing at which time he also has 30 days in which to deposit that book.

It says on the bottom "Clearance." When he brings that clearance in to me or deposits it with me, then, I issue him a temporary working permit pending the clearance of his book at which time I

(Testimony of William J. Savage.)

would make out the other side of the clearance stating that he had deposited his book, the date he deposited it, and I would tear off the bottom half where the perforation is and send that back to the International Union back in Indianapolis, and, also, notice the local union from whom he had cleared that he had deposited his book in our local union. If he had paid any dues beyond the current month, we would request that those dues be refunded to my local union.

Q. Now, have you had occasion or experience with a situation where a member has come into your jurisdiction without having those clearances in the back of the book filled out?

A. Yes, sir, I have.

Q. And decided to deposit their book?

A. Yes, I have. [1704]

Q. Tell us what happens in those circumstances?

A. Well, if a member comes in with a book that does not have the clearance from the local union where he belongs, I ask him if he wants to clear in. If he requests, then, I would take his book and mail it back to the local union for him where he belongs and request them to issue a clearance and mail it back to me so that he could be cleared into the union and, pending, while this is going on which would take a few days, I issue him a temporary working card so he can go to work.

Q. Is there any charge for that?

A. No, sir.

Q. Now, directing your attention to the work

(Testimony of William J. Savage.)

list, again and also referring to your experience, your understanding and your instruction, can any persons irrespective of union membership sign that work sheet? A. Yes, he can.

Q. Can a person who has never had membership in the Carpenters sign that work sheet?

A. Yes, he could.

Q. And can he be dispatched from that work sheet?

A. It is my understanding that he could be dispatched and given a temporary work card on a 30-day basis. At the end of 30 days, he should make up his mind whether he wants to join the union or not.

Q. In such circumstances, are there any charges for issuance [1705] of that card?

A. No, sir, there would not be any charge.

Q. Now, you have in your organization a card known as a temporary working card?

A. That's right.

Q. Sometimes referred to as a permit?

A. That's right.

Q. When are those permits issued?

A. Well, those permits are issued when a member comes in and makes an application to join the union. He pays a deposit on his application and he also is issued a temporary working card pending the full payment of his initiation fee and his initiation into the union. That is one time that we issue those permits.

Then when a man puts his book in for a clearance, he is issued a temporary work card. If he puts

(Testimony of William J. Savage.)

his book in, requests me to send it back to the local union for clearance, he is also issued a temporary work card. And if he has a clearance, he is issued a temporary work card pending the process of clearing him.

Mr. Heimann: May I have Mr. Nicoson's question and the answer, please?

(The record was read.)

Q. (By Mr. Nicoson): Now, are there any other circumstances under which a temporary working card is issued that you know of? [1706]

A. Well, a temporary work card or a work permit would be issued if a man had his book with him and he didn't definitely want to clear into any local union. He would have to obtain that permit from the District Council of Carpenters.

Q. Do you know whether or not that is a requirement of the constitution of the Carpenters?

A. I believe it is, yes.

Trial Examiner: If I may interrupt for just a moment, Mr. Savage, you distinguished this last type of situation from the others that you previously mentioned by saying that he would have to obtain a permit under the last set of circumstances from the District Council of Carpenters.

From whom are these temporary working cards secured in the other situations that you previously mentioned?

The Witness: From myself.

Trial Examiner: I imagine that Mr. Nicoson is going to ask a question with respect to charges, if

(Testimony of William J. Savage.)

any, incidental to the issuance of a temporary working card in the last situation that you described. Just to bottle the whole situation up, I'd like to ask this, when you issue a temporary working card yourself in these situations that you described previous to this last one, are there any charges involved under any of those circumstances?

The Witness: None whatsoever.

Trial Examiner: So what it amounts to is the temporary [1707] working cards issued under such circumstances that do not require the payment of any fee are issued by you?

The Witness: That is true.

Q. (By Mr. Nicoson): When this temporary working card is issued by the District Council under the circumstances which you have just described, do you know whether or not there's a requirement with respect to the payment of money in those situations?

A. It is my understanding that they pay the current dues which prevailed at that time.

Q. What do you mean by current dues?

A. Well, the monthly dues that any member would pay that belonged to the union in this area.

Q. In other words, he would pay for the permit the amount equivalent to what would be a monthly dues, say, for example, in 1400?

A. That is true.

Q. Do you know what happens to that money when it is paid into the District Council?

A. I do not, sir, I don't know that.

(Testimony of William J. Savage.)

Q. Do you know Mr. Dowdall who sits over here to my left, or you have seen him before?

A. I have seen Mr. Dowdall before.

Q. Do you know Mr. Johnny Dockery?

A. I have seen Mr. Dockery before, yes. [1708]

Q. Johnny Dockery, the evidence in this case indicates, was a member of Local 1400, was a member for approximately four years?

A. I believe he was a member. I don't know just how long.

Q. During that period of time, did you have occasion to see him in and around the union hall?

A. I believe I saw him at a few meetings. That was all.

Q. Incidentally, that work list that you have in front of you, how long has that system of that work list been in effect, to your knowledge?

A. Oh, it's been in effect way, way before I ever came into the office. I have been there four years. I don't know, been there quite a few years.

Q. You are a member of 1400? A. Yes.

Q. Have you signed that list before you got the present job? A. Yes, sir; yes, sir.

Q. Then do you know how long this system of filling out the list and showing up on Tuesday morning for the signing has been in effect?

A. It's been in effect for, I don't know, I'd say ten, maybe longer, than that, ten years or longer.

Q. That you know of? A. That is true.

Q. So far as you know has there been any deviation in this [1709] routine in the past ten years?

(Testimony of William J. Savage.)

A. No, sir.

Q. Mr. Dowdall and Mr. Dockery said that they met you some time in December at the local hall down here at 1400, do you recall that?

A. Yes.

Q. Do you recall what time of day it was they first saw you?

A. As far as I can recall, it was in the morning.

Q. In the morning? A. Yes.

Q. About what time?

A. I would say around 8:00 o'clock.

Q. 8:00 o'clock. Where did they see you?

A. At the union hall in the window in my office, came to the window in my office.

Q. Where were you?

A. I was inside the office.

Q. Was there anyone else around there besides the three of you?

A. Quite a few of the members around the hall.

Q. Were they union members?

A. Yes, I assume they were.

Q. Do you know whether or not they were waiting for assignments?

A. That is true, yes. [1710]

Q. Tell us how many were around there.

A. I'd say probably 35, 40, maybe more than that, I don't know.

Q. What were they doing, just sort of milling around or waiting? A. That's right.

Q. Doing the things people do when they wait?

A. That's right.

(Testimony of William J. Savage.)

Q. Whatever they are. Did you have a conversation with Mr. Dockery and Dowdall at that time and place?

A. Yes. Mr. Dowdall and Mr. Dockery had a request for work to go to work for Pardee Construction Company.

Q. That was a written request?

A. That was a written request.

Q. I show you a document which is in evidence as General Counsel's Exhibit 27 and ask you if you ever saw that before.

A. I believe that is one of the requests that he had.

Q. Now, do you recall whether or not the writing in the lower left-hand corner was on there when you saw it? A. I don't recall that.

Q. That is what you referred to as being a request to the Pardee job? A. That's right.

Q. Now, tell us what was said there by the three of you and what, if anything, was done. [1711]

A. As I recall, Mr. Dockery and Mr. Dowdall showed me the request and they also had books with them and they stated that they had not, they didn't have a clearance in their book and didn't wish to clear in but wished to keep their books in Alaska and, also, that they wanted a work order to go to this job.

And, as I recall it, I told them that I couldn't issue a work order because they had no clearance deposit in their book. They would have to go to the District Council of Carpenters and obtain a book

(Testimony of William J. Savage.)

down there if they didn't wish to put their book in or clear into the local union and, also, I told them that on that request, we had a lot of men out of work and that they just come in from Alaska and they would have to see Mr. Robert O'Hare, business representative, and talk to him about the job or getting the work order. And there was some other discussion, they asked why and the wherefore, and I told them that was my orders, any request, Mr. O'Hare would have to O.K. them due to the large amount of men we had on the out-of-work sheet and, after that, they left and, apparently, went down to——

Q. You don't know where they went?

A. I don't know where they went.

Q. Let's don't be "apparent." During the conversation state whether or not anything was said about that work list.

A. The list, the sheet that was being used at that time, I [1712] think it was No. 3 sheet, if I remember right, was on the counter top and I told them how many men were out of work at that time.

Q. Did you show them the list?

A. The list was right there, yes, sir.

Q. Did they see it? A. Yes, sir.

Q. Did you tell them what it was for?

Mr. Heimann: I move to strike the answer that they saw it as a conclusion.

Trial Examiner: Overruled. Motion to strike denied.

The Witness: I told them that that was the work

(Testimony of William J. Savage.)

list we go by and that men sign that and that they could sign the list.

Q. (By Mr. Nicoson): Did you say anything about men on the list and what they were doing?

A. Well, that they were on the list, I mean on the list looking for work.

Q. I see. And you showed them the list, I believe you stated? A. That's right.

Q. Will you turn over to Page 3 of the document which is now in front of you, Respondents' Exhibit 7, and I will ask you to state if you now recall that that is the sheet that you showed Mr. Dockery and Mr. Dowdall at that time?

A. That is the sheet, yes.

Q. I want to direct your attention to the top of the page [1713] where there's in typewriting on red typewriter ribbon a date inserted. Was that date on there when you showed it to Mr. Dowdall?

A. Yes, sir.

Q. Did they sign the list at that time?

A. No, sir, they did not.

Q. Did they have any questions about the list?

A. No, I don't recall that they did.

Q. Did you see them again that day?

A. Yes, I believe it was somewhere between 12:00 and 1:00 o'clock. I don't know just what time, I believe they came back somewhere in that time area, and they had obtained at that time a, showed me a permit they had obtained from the District Council of Carpenters and——

(Testimony of William J. Savage.)

Q. Did you have another conversation with them at that time?

A. Well, again, they requested——

Q. Just a second, did you have a conversation?

A. Yes, sir.

Q. Who was present when this conversation occurred?

A. As I recall, just myself and Mr. Dockery and Mr. Dowdall. I don't recall any others.

Q. Tell us what was said and what they said and what was done, if anything.

A. They showed me the work permits they had obtained from the District Council of Carpenters and, of course, they still [1714] wanted a work order and I told them, I told, Mr. O'Hare had called in and I told him what happened and he said if they came back, tell them to wait around and see him, which I told them to do at that time.

Q. Was that about the size of that conversation?

A. I believe it was, yes.

Q. Do you know whether or not they did wait?

A. Oh, yes. They waited, yes.

Q. Later in the day did they have a conversation with Mr. O'Hare?

A. Yes, Mr. O'Hare came in later that afternoon.

Q. Were you present during that conversation?

A. I was in the office, yes.

Q. And Mr. O'Hare was there?

A. Mr. O'Hare, yes, he came in.

Q. That office of yours, about what size is it?

(Testimony of William J. Savage.)

A. It's a cubbyhole, about 8 by 10, something like that.

Q. Two desks in there?

A. That's right, two desks.

Q. A little table underneath the window?

A. No, there's no table underneath the window.

Q. There is, however, a shelf?

A. A shelf, counterlike thing.

Q. Out on both sides of the window, a short counterlike? A. That's right. [1715]

Q. When Mr. Dockery and Mr. Dowdall had that conversation with Mr. O'Hare, where was Mr. Dockery and Mr. Dowdall, inside or outside?

A. They were outside.

Q. At the window? A. At the window, yes.

Q. Where was Mr. O'Hare?

A. Inside the office.

Q. Standing at the window or desk or where?

A. He stood up toward the window, yes.

Q. Just the four of you there as far as you know? A. As far as I recall, yes.

Q. Will you tell us as best you now recall what was said and done and who made the statements?

A. Well, Mr. O'Hare told them that under the circumstances he could not issue a work order because of the men that we had on the work list and he explained the work list to them.

Q. What did he say about the work list?

A. He told them that they were welcome to sign the work list and get on the work list and that he

(Testimony of William J. Savage.)

could not issue any work order to them for that job. He also told them that——

Mr. Heimann: Who told?

The Witness: Mr. O'Hare. He, as I recall, explained the situation that there was so many men out of work and that they were not to go on that job without a work order that, under the [1716] Carpenters constitution or District Council by-laws, they would be subject to a fine if they did so.

Q. Anything further?

A. Well, there was quite a little discussion. Of course, I was answering telephones and all that during this discussion. I didn't quite get all of it but there was quite a little discussion on it between Mr. O'Hare and Mr. Dockery. I had no part in that discussion at all. Then Mr. Dowdall and Mr. Dockery did sign the list at that time.

Q. Did you have anything to do with their signing of the list?

A. Not personally, no.

Q. Did you hand the list to them?

A. As I recall——

Q. Or did Mr. O'Hare?

A. I believe I did, handed—I don't believe it was the list. I think the list was there. I think it was a pencil that I handed to them to sign it. I believe that was it.

Q. Is it your recollection that the list was there laying in the window?

A. Yes, my recollection is that.

Q. All you did was hand them the pen so they could sign?

A. That is true, yes.

(Testimony of William J. Savage.)

Q. This Steve Mazurek was there at that time?

A. I believe he was there, yes, he was.

Q. Did you hear any conversation about signing the work [1717] list anybody had outside of what you have already told us?

A. No, I don't recall that.

Q. Now, for the purpose of refreshing your recollection, did you hear Mr.—state whether or not you heard Mr. O'Hare say anything about an agreement which the local, or the Carpenters, had with the contractors. Say yes or no.

A. Yes, yes.

Q. What did you hear Mr. O'Hare say in that respect?

A. I believe that was that Mr. O'Hare stated that we had an agreement signed with the Contractors Association regarding the hiring of the men and that the men were supposed to hire through the hall. I don't know, I guess I don't seem to remember very much more about that.

Q. All right. Did you see whether or not Mr. O'Hare handed Mr. Dowdall any paper while he was talking about this agreement?

A. I don't recall that.

Q. I show you a document which is in evidence as Respondents' Exhibit 6 and ask you to look at it and state if you have ever seen a document like that before.

A. I have seen one before, yes.

Q. And I draw particular attention to the portion of it which is marked Section III of that document—

A. Yes.

(Testimony of William J. Savage.)

Q. And ask you whether or not that section has anything to do with the operation of the work list which is now in [1718] front of you.

A. Yes, it does. Yes, as I understand it, it does.

Q. That is, as you understand it, the procedure and contractual provisions under which this work list is operated? A. Yes.

Q. I show you now another exhibit which is marked Respondents' Exhibit 3 for identification and ask you to examine it and see if you know what it is.

A. That is a work order that we issue to men when they are dispatched to a job.

Q. Did you ever see that work order before?

A. Yes, sir.

Q. Did you ever have anything to do with it?

A. I wrote it.

Q. That is your handwriting? A. Yes, sir.

Q. And you issued it to Mr. Dockery on about January 6, 1954? A. I did.

Mr. Nicoson: I offer Respondents' 3 and 7 in evidence.

Mr. Heimann: No objection.

Trial Examiner: Very well, Respondents' 3 and Respondents' 7 will be received in evidence.

(The documents heretofore marked Respondents' Exhibit Nos. 3 and 7 for identification were received in evidence.) [1719]

RESPONDENTS' EXHIBIT No. 3

WORK ORDER

Los Angeles County District Council of Carpenters

Room 602 Labor Temple, 538 Maple Ave.

MAadison 9-1657

MAadison 9-1657

S M, Calif., Jan. 6, 1954

Report to Zoss Cont. Co.

Address National Sawtelle

Introducing Mr. J. Dockery

Date and Time to Report on Job.....

Remarks:.....

Social Security No.....

(Note) This man has been sent to work from this office by your order. If he is not put to work you must pay him two (2) hours pay.

Earl E. Thomas, Sec'y-Treas.

By

Authorized Representative.

(Note) Any member accepting a work order and not reporting must report the same to this office immediately.

Report to Steward before going to work.

CARPENTERS LOCAL UNION NO. 1400

2439 Santa Monica Boulevard, Santa Monica, California

OUT OF WORK SHEET

From December 1st 1953

To December 8th 1953

NO	R	F	NAME	Phone No.	Local No.
I	+		Joe Cray	AR85059	1400
2		X	W J Houl	KB58066	1400
3			John A Fitchell ^{12/4/53}		1400
4	X	1	W R Edmon	EY97893	1400
5	X	X	Harmom Smith		1400
6		X	C W Ferguson		1400
7		X	Edward Mackinay	EX62348	1400
8			S M Q D E L E Y S X i	EX65025	1400
9			John B. Saltnes-	EX9,5583	
10			Sam Stein	EX6-0828	1400
11			Robert Elliott	VE80410	1400
12			J. Watson	EX98208	1335-
13			H. Quinn		1400
14			George Miller ^{12/3/53}		1400
15	X		C. Hancock ^{12/7/53}		1400
16			John Campbell ^{12/2/53}		1400
17			George Gandy ^{12/3/53}		1400
18			A. Lynch		1400
19			John Edge ^{12/3/53}		1400
20	X		Alfred Ernest Webb ^{12/2/53}		1400
21	X		Ken Browner		1400
22			P. H. Fisk ^{12/3/53}	EX C 2534	1400
23			Ray Shick	AP73081	1400
24		X	W H Wells		1913
25			Bob Aubrey NPD	EX47157	1400
26	X	X	George Hefthouse ^{12/4/53}	EX34809	1400
27			Ed K. Williams ^{12/1/53}		
28	X	X	Margaret Schuchert ^{12/1/53}		1400
29			Ed Spangiel	EX32269	1400
30	X	X	Bolt Jensen	VE92392	1400
31	X		Harold Wiselood		1400
32	X	X	G. O'Connell	EX60227	1400
33			Joe Warner		1400

CARPENTERS LOCAL UNION NO. 1400

---SHEET--- 2--

2439 Santa Monica Boulevard, Santa Monica, California

OUT OF WORK SHEET

From December 1st 1953

To December 8th 1953

NO	R	F	NAME	Phone No.	Local No.
34	X		Jim Harper	OR 2-2747	1400
35	X	L	R. Di Pietro		1400
36			George Berglund		1400
37			Jed Jennings		
38			William J. Phillips		1400
39			Van Houten		1400
40	X	X	Vern A. Gleich	EX 45765	
41			Geo. H. Brown		1400
42			D Redmond		1400
43			Ross Harris		
44	X	X	Les. W. Chalmers	AR 3-2920	1400
45			M. Shunk		1400
46			Ed Rine 7th fl apt	AR 99391	75
47			Harvey Jennings		25
48			Frank Fehring		1400
49			W J Gellens	AR-91974	1400
50			John J. Lott postmaster		1400
51			Harry Montgomery	73035	2375
52	X	X	BILL MUELLER	47103	1400
53			W. J. Greff FINISH.		1400
54	X		E. W. Black	66628	1400
55			Willard C. White		1400
56			John C. Haulton 12/7/53		1400
57			Mom Ben Goldberg	EX. 67396	1400
58	X		Dallapelle	EX 63695	1400
59	X	X	A. Antoniewski		1400
60			Roger Cotton		1400
61			Larry Blum 12/7/53	AR 79055	1913
62	X	X	Ronald Cabrera	AR 36755	1400
63			H. Greenfield (Finish)		
64			William Wong Finish	EX 72626	1400
65	X		W. W. Edlesby		1400
66			James E. Cady		1400

Respondent's Exhibit No. 7--(Cont.)

CARPENTERS LOCAL UNION NO. 1400 ---SHEET--3--

2439 Santa Monica Boulevard, Santa Monica, California

OUT OF WORK SHEET

From December 1st 1953

to December 8th 1953

NO	R	F	NAME	Phone No.	Local No.
67			W. W. Reese	EX 4486	1052
68			Dan Patillo		1400
69	✓	✓	George D. Storr	EX 4-6391	1400
70	x	x	Victor A. Blunt	EX. 45765	1400
71		✓	E. G. Gredgo	EX 8-5151	1400
72			Alex Rowal	" " "	1506
73			J. J. Carver		1400
74			P. E. Sanders	EX. 91953	1478
75			J. J. Robinson	EX. 45768	583
76		X	Mal Chelgren		1400
77			Robert S. Waddell	EX. 51207	1400
78			William L. Burtwick	EX 66232	1400
79			Bill Speegle		
80			Jack Allen 12/7/53		1400
81	x	x	Laure Arnold 12/7/53	EX 5-7700	1400
82			Joe M. Blair	EX 98578	1400
83			Ray Johnson	EX 67663	1400
84	x	x	L. J. Maynard		
85	X		W. L. Wilson		1400
86			Jim Russell	EX 7-4315	1400
87			W. Hartingford	EX 90765	1400
88			R. J. Barnard 12/4/53	EX 5-2604	1400
89	X	X	Leonard W. Larsen	EX. 1-4383	1400
90			Wm M. Cullough		Permit 128
91			C. J. Vaughan	PL 88991	2435
92			Robert Witkowski		1913
93			James J. ...	EX 1400	
94			J. H. Duckery	DI. 86655	PERMIT
95			C. H. Dowdall	DI. 86655	PERMIT
96	X	X	Sam ...		1400
97			Wm. Davis		1565
98	✓	✓	F. E. ... 12/4/53	EX 7-22	1400
99	✓	✓	D. ...		1400

CARPENTERS LOCAL UNION NO. 1400

---Sheet---4--

2439 Santa Monica Boulevard, Santa Monica, California

From December 1st 1953 OUT OF WORK SHEET to December 8th 1953

NO	R	F	NAME	Phone No.	Local No.
100	X	X	Paul Hollington	Ho 5-1724	929
101	X		Mike Della		1400
102	X	X	Lo Patrie		1400
103		X	Elmer Desper	64813	1400
104	X	X	Wm. Hollington	7-3253	1400
105	X	X	Leslie G. Martin	VE 86423	1400
106			Harold L. Thompson	30-2714	844
107	X	X	N. L. Pandrugoff	EX 3-8932	1400
108	X	X	Glen Wittlauer	AR-3-2356	1400
109			Cloris M. Danson	EX-61709	1400
110			Jack Pearson 12/1/53	7-53	1400
111	X		Wilmot Ernest Webb		1400
112	X	X	Frank Gajacosta	EX-93118	1
113	X		E. E. Lammann	Q1. 92879	1400
114			Jack Pearson 12/1/53	EX 60432	1400
115			Henry G. Barnes		1400
116			Jim Speciall	EX 7-4315	1400
117			Bright Miller	EX 6-4485	1400
118			Wm. Waller		1400
119	X		J. V. Moor		1400
120	X		Richard P. Thirt	VE 5-133	1913
121			William K. Hargrave	47162	1400
122			James J. Macho		1400
123			Wallace Gehring	EX-65321	1400
124			John Gehring	EX-60091	1400
125	X		W. C. ...		1400
126			Carl H. Gushler	EX 84604	1400
127			Al Lunell		
128			Howard ...	31-6221	1400
129			Wm. Luthie	ARK-77625	1400
130			W. G. Grallo		1400
131			B. J. ... (app)	EX 71464	1400
132	X		John C. ...	EX 37101	1052
			N. F. ...		1400

CARPENTERS LOCAL UNION NO. 1400

2439 Santa Monica Boulevard, Santa Monica, California

5
807

OUT OF WORK SHEET

NO	R	F	NAME	Phone No.	Local No.
133			Carl W. Barton		1400
134			James B. Aldridge		1400
135			R. L. Tordella		1052
136			George L. Doherty		1400
137			W. E. Doherty		1478-
138			W. E. Doherty		1400
139			C. W. Burrows		1400
140	X		D. Ortiz	HR. 85106.	1400
141			T. O'Connell	APP - 7 th	1400
142			J. Lervic		1400
143					
144					
145					
146			Respondent's Exhibit No. 7--(Cont.)		
147					
148					
149					
150					
160					
161					
162					
163					
164					
165					
166					
167					
168					
169					
170					
171					
172					
173					
174					

(Testimony of William J. Savage.)

Q. (By Mr. Nicoson): I now show you a document which is in evidence as Respondents' Exhibit 7 and ask you to examine it and state if you have ever seen any cards *like before*.

Trial Examiner: You meant 11, did you not?

Q. (By Mr. Nicoson): 11, I mean 11.

A. Yes, I believe I have seen these before.

Q. Did you ever fill any of them out?

A. Yes, well, I don't know. I think that has something to do with the Department of Employment. I'm not sure.

Q. All right. You fill them out?

A. Yes, sir. [1720]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Heimann): Do you know which sheet was there in the morning about 8:00 a.m., the morning when they first came in?

A. It would be No. 3 sheet.

Q. I see there that men from other locals signed that list, for instance, from Local 1335, 1913?

A. Yes, 75 and so on.

Q. Are all those locals locals within the jurisdiction of the Los Angeles District Council? [1721]

A. That is true, yes.

Q. How about men from locals outside that jurisdiction, can they sign the list?

A. They could sign the list but they would have to clear their book and get the book, clear the book into the local union or work on a permit from the District Council, but they could sign the list.

(Testimony of William J. Savage.)

Q. But they either have to put the book in or get a permit from the District Council first before they signed the list, is that correct?

A. No, not necessarily, no. They could sign the list and do that afterwards.

Q. But that is a condition that they——

A. They would have to put the book in in order to obtain a permit, yes.

Q. In other words, they wouldn't be sent out to work unless they put the book in or got a permit?

A. That's right.

Q. And if they get a permit from the District Council, that means they have to pay the fee, whatever it is?

A. Yes.

Q. You said Mr. Dockery and Mr. Dowdall first came in about 8:00 o'clock in the morning, is that right.

A. I believe it was about that time.

Q. Do you know what day of the week it was?

A. I believe it was a Thursday but I wouldn't be positive of that.

Q. You can't tell from the list on what date it was, can you?

A. No, I really couldn't tell that.

Q. Do you have any way of knowing the date?

A. No, I wouldn't have any way of knowing the date.

Q. I see. When they finally signed the list, about what time was that?

A. It was late in the afternoon after Mr. O'Hare was there and they were talking to Mr. O'Hare.

Q. About 4:00 o'clock?

(Testimony of William J. Savage.)

A. I would say it was somewhere in that vicinity. [1723]

* * * * *

Q. After a member deposits his book in the local, he's a member of the local then, isn't he?

A. That is true. In other words, when he deposits his book, he's given the temporary card and then at the next meeting, his book is presented to the president of the local and he reads the clearance and the members vote to accept the clearance.

Q. I see. When this clearance is accepted——

A. He's definitely a member.

Q. ——he is a full-fledged member?

A. That is true.

Q. In other words, he doesn't have to do anything else before he becomes a member, it's only the board of membership that is required to make him a member?

A. That's right.

Q. Now, there's one part of your direct [1724] testimony that I didn't quite get. It's in relation to the case where someone comes in with an application for membership, are there such cases where you have application for membership?

A. Well, yes, when a man comes up and he says that he wishes to join the union, I explain to him, in the first place, I try to find out, naturally, if he is a carpenter and how much experience he has had.

Then, we have an application for membership.

Q. That is used only for people who aren't in the United Brotherhood of Carpenters at all, is that right?

A. That is true.

(Testimony of William J. Savage.)

Q. In other words, if a man is a member of another local, he wouldn't fill in the application for membership? A. Oh, no, no.

Q. And you stated something to the effect he pays the deposit on the application. Would that be the deposit on the initiation fee, is that it?

A. That is true.

* * * *

Q. (By Mr. Heimann): Now, if a carpenter comes in who is not a member of the United Brotherhood, does he need a temporary working card before he can go out to work before you dispatch him? [1725]

A. Well, he would have to have a working card, yes, sir.

Q. Who issues that temporary working card to him? A. I would issue that.

Q. Would you ask him whether he would join the union within 30 days?

A. It was my understanding that he would be issued a temporary working card pending 30 days at which time he was supposed to join the union.

* * * * *

Q. (By Mr. Heimann): Has this ever happened?

A. It has never happened. I never had that experience. [1726]

Q. Have you ever had a non-member come in at all?

A. I never had that experience since I been in the office. [1727]

* * * * *

(Testimony of William J. Savage.)

Trial Examiner: By the way, from whom in the organization do you get your instructions in that regard?

The Witness: Mr. O'Hare was the—gave me my instructions. He's the business representative.

Trial Examiner: Very well.

Q. (By Mr. Heimann): Now, when Mr. Dowdall and Mr. Dockery came in in the morning at 8:00, do you say that list was lying in the window?

A. Yes, sir.

Q. Did you tell them they could sign it then?

A. I told them that the procedure was to sign the list but there was quite a little discussion on the request and about the depositing of the book, or obtaining a permit and, as I recall, Mr. Dowdall asked where they obtained this permit and I told him at the District Council which at that time [1728] was in the old Labor Temple and there wasn't too much discussion that morning, as I recall. They took off and left the office.

Q. Well, you told them that before you could send them out they would have to get the temporary working card, is that right?

A. I told them that they would have to go to the District Council, take their book with them, and they would have to obtain a work permit or temporary working card, whichever it is, from the District Council, I had no authority to issue those.

Q. You told them that they had to do that before they could go out to the work, isn't that right?

A. I don't recall just saying that, no. I told

(Testimony of William J. Savage.)

them as to the request they would have to see Mr. O'Hare on that.

Q. Isn't that what you told them when they came back in the afternoon?

A. I told them that in the morning that they would have to see Mr. O'Hare.

Q. Didn't you only tell them that after you had talked to Mr. O'Hare?

A. No, sir, I told them that if they want a request like that they would have to talk to Mr. O'Hare and I couldn't get a hold of him right then, I didn't know just where he was but I did tell them about the permit.

Q. By the way, I want to show you Respondents' Exhibit No. 7. [1729] After the names of Dockery and Dowdall and the numbers, there appears the word "Permit" in both lines. Did you write that? A. No, sir, I did not.

Q. Do you know who did?

A. No, I assume they did.

Q. You assume they did. You didn't see them put it on, did you?

A. I wasn't at the window when they signed the list. Mr. O'Hare was there.

Q. In other words, you didn't see them put it on? A. No, I didn't see them put it on.

Q. But you know you didn't put it on?

A. I know I didn't put it on, definitely.

Q. There's another man in Line 90, William McCall, where it says permit, is that right?

A. That's right.

(Testimony of William J. Savage.)

Q. You don't know who put that on, do you?

A. No, I don't. I didn't put it on.

Trial Examiner: As long as there is reference to Mr. McCall's name, I will ask you, do you know anything at all about the number that appears right next to the word "Permit" in the right-hand margin, 1281, do you know anything about that?

The Witness: I don't know. That could be a local number that he belonged to. I don't know what that local number could be, out of the county, I don't know where it was from. [1730]

Trial Examiner: We know already it is the local in Anchorage, Alaska, in which Mr. Dowdall and Mr. Dockery had books deposited.

The Witness: I see.

Trial Examiner: I am curious as to whether you had any knowledge whether it appeared opposite the name in respect to Mr. McCall?

The Witness: I don't know, I have no idea.

Q. (By Mr. Heimann): This conversation in the morning was very short, is that right?

A. Yes.

Q. They just showed you their work request?

A. Right.

Q. I believe you testified on direct examination you said you couldn't issue them a work order since they had no clearance and they would have to go to the District Council?

A. That is true.

Q. Are you sure that you mentioned that work

(Testimony of William J. Savage.)

list to them or did you just assume that they saw it there?

A. I mentioned that list to them and told them and pointed out that there was quite a lot of men on this list out of work.

Q. Are you sure you said there are quite a lot of men on that list or did you just say quite a lot of men waiting for a job? [1731]

A. I pointed out on the list to them. The list was right in the window.

Q. You remember that specifically?

A. I certainly do.

Q. Did you explain to them what that list was?

A. I told them that was the work list. As I say, there was so much discussion, quite a bit of discussion on the work permit and, the request, rather, and going to the Council. I explained to them at that time that there was a lot of men on the list and that that was the work list. As I say——

Q. Well, yes, go ahead.

A. After that they left the building.

* * * * *

Q. (By Mr. Heimann): Do you remember now that you said that?

A. I told them that the work list was right there and quite a number of men on the list.

Q. Yes, but my question relates as to whether you told them exactly what that list was, you explained it to them?

A. Well, I assume they knew that work list was [1732] men out of work. I didn't, I told them that

(Testimony of William J. Savage.)

that was the work list and that it was numbered there how many men were out of work on it. I don't recall whether I specified the last number on the last man on the list at that time, I don't recall that.

Q. And you assumed that they knew how the list would work?

A. Well, I told them that at that time they could sign the work list if they wished to.

Q. You told them they could sign in the morning?

A. Pardon me, no, that was in the — I can't swear to that, no.

Q. I see. Well, let me ask again, you assumed that they knew how the list worked?

A. Well, yes.

Q. Now, when they came back in the afternoon, you told them they had to wait for Mr. O'Hare?

A. That's right.

Q. Was there any lengthy discussion about it?

A. No, not too much discussion. I told them that Mr. O'Hare, I had contacted Mr. O'Hare and Mr. O'Hare told me that if they should come back to have them wait for him, he would be in later that afternoon. I don't recall that there was too much discussion about it, no.

Q. Which was about 1:00 o'clock, was it?

A. I would say in that vicinity, yes.

Q. Either at 1:00 o'clock or at 8:00 o'clock in [1733] the morning, was there any great argument about it?

(Testimony of William J. Savage.)

A. No, I wouldn't say there was any argument about it. Mr. Dockery couldn't understand why I couldn't do that, this or that I didn't do that, and I told him that, I said, "I work here and Mr. O'Hare's orders are that you wait here and have to see him and that is it."

* * * * *

Q. Now, when you talked to Mr. O'Hare on the telephone, what did Mr. O'Hare say?

A. Mr. O'Hare told me that when, if they came back in the afternoon that he would be in later on and to tell them to wait for him and he would talk to them.

Q. Did Mr. O'Hare say whether he knew Dockery and Dowdall? [1734]

A. No, he didn't say.

Q. He didn't say? A. He didn't say.

Q. By the way, you know that Dockery and Dowdall had a case in Alaska?

A. I didn't know that, no.

Q. You know it now?

A. I know it now, I didn't know it at that time.

Q. When did you find out about it?

A. I believe that Mr. O'Hare told me about it after they had filed this case. I believe it was after that. I didn't know anything about it until then.

Q. Did Mr. O'Hare mention it on that day?

A. That day?

Q. I'm referring to December 3 or 4, whenever it was.

(Testimony of William J. Savage.)

A. No, it was sometime after that. I don't recall when it was but it was sometime after that.

Q. Now, when Mr. O'Hare talked to them, he told them they could sign the list, is that right?

A. That is true.

Q. He explained that there were many on the list who were waiting for work, is that right?

A. That is true.

Q. He said that those in the list were members in this area?

A. I don't recall that he said that especially, I don't recall that. [1735]

Q. Didn't he say that they had the book in this local, Local 1400?

A. I don't recall him saying that. I don't recall that especially.

Q. You don't recall that he said that there are many waiting who have their book in here?

A. He may have said that, I don't recall that. I mean I really can't say truthfully say yes he did, I don't know.

Q. He also said—let me put it this way, you testified that he said they'd be subject to a fine if they went out to work without the work order?

A. I believe he said that, yes.

Q. Didn't he also say that they'd be subject to a fine for getting their own jobs?

A. I'm not sure whether he said that or not, I don't know.

Q. Did you hear whether he said that the su-

(Testimony of William J. Savage.)

perintendent at the Pardee job also would be subject to a fine?

A. I believe he did mention something about that.

Q. Did he say what for?

A. Why, for sending these requests in when he is supposed to call the hall, something on that order, as I recall.

Q. Don't you frequently get requests from the contractor that are brought in by the men?

A. Contracts that have, that are clearing their [1736] own men and they started a job and they have men working probably on another job and want to transfer them over into our area. They send a man in with a request, yes.

Q. Now, do you know whether Mr. O'Hare said he couldn't send them out to the Pardee job or couldn't send them out to any job?

A. I don't recall him saying that, no. He wouldn't send them out, he wouldn't issue a work order for the Pardee job but as to any other job, I don't recall him ever saying that.

Q. I see. As a matter of fact, as far as the union was concerned, they couldn't go to any job unless they were called? A. Yes.

Q. By the union?

A. By the union. When their name is on the list, they would be eligible for any other job, yes, sir.

Q. And they would only be called if the people

(Testimony of William J. Savage.)

ahead of them either had found jobs or in some other way dropped off the list?

A. Yes, when their name came up on the list, yes. [1737]

* * * * *

Q. (By Trial Examiner): [1749]

* * * * *

Q. Now, there has been testimony in this proceeding, [1752] Mr. Savage, that some of the contractors who may call upon you for men to be dispatched have been signed to a contract described as a short form contract which may have been a contract either identical with or similar to Respondents' 6? A. Yes.

Q. Do you have any personal knowledge of the fact that agreements like Respondents' 6 have been used to sign contractors up?

A. Yes, I believe they have, I'm sure they have.

Q. When a particular contractor calls in for men, do you have any way of knowing whether that particular contractor is a signatory party to any kind of contract with the Carpenters Union?

A. Well, I have a book, a looseleaf book that is issued, we get from the Los Angeles Building Trades Council and it has the looseleaf pages of the signed contractors in there and then, there's, they issue a supplement of it every so often to add to it.

Q. I see. Can you describe the book physically?

A. It's a black looseleaf book similar to the one you have there but I would say it's possibly

(Testimony of William J. Savage.)

about five inches wide and about six or seven, maybe eight inches deep. It's a ringbinder and that's about the story of it. And, then, as the looseleaf supplements come in we add to it. It's a looseleaf binder.

* * * * *

Q. (By Trial Examiner): Had you ever received earlier calls [1754] for any job in the territory of Local 1400 from the Zoss Construction Company? A. For men, you mean?

Q. Yes, before the date you dispatched Mr. Dockery. A. Oh, yes.

Q. Did you have any way of knowing at the time you received such calls whether Zoss Construction Company was a signatory party to any kind of contract with the Carpenters Union?

A. Yes, I was under the impression they were under agreement with it.

Q. How did you acquire that impression or knowledge?

A. They are in the looseleaf book that I spoke of and they signed on there as Zoss Construction Company.

Q. Did you have any such information as to Pardee Construction Company?

A. Well, yes, they are definitely signed, yes.

Q. And you base that statement upon the fact that they appear in this little black book that you received from the Building and Construction Trades Council?

A. That is true. [1755]

* * * * *

(Testimony of William J. Savage.)

Q. Have you had very many experiences of a type similar to that involved in the situation of Mr. Dowdall and Mr. Dockery of individuals coming into Local 1400 with their books deposited in locals outside Los Angeles County who have indicated a desire to work on a permit rather than clearing their books in?

A. Not too many. They are in the minority by a long way, not too many.

Q. Of the instances that you have had and may now recall, can you recall whether any of the individuals involved gave you any reasons as to why they might want to follow that practice instead of clearing in? [1761]

In some cases, the local unions in the past have indicated that some of these local unions have had insurance policy strictly, or death benefit, rather, established in that local union and, rather than clear out and lose that death benefit, they would much rather keep the book in and work on a permit to keep this death benefit in good standing.

* * * * *

Q. Now, you have also testified and there has previously been testimony that persons who are members of other local unions in the Los Angeles District Council's territory may, if they are unemployed, sign up on the out-of-work list at your local as well as a number of others?

A. That is true.

Q. Now, what, if anything, happens when these individuals come in with membership in this local

(Testimony of William J. Savage.)

other than 1400 and they have no connection with a job that is just starting up in your territory, just looking for work in your territory. What is the procedure as far as their getting signed up and [1767] getting possible work order is concerned, describe how that works.

A. Well, they sign my work list and, as I have already testified, we go down the list. When their name comes up, regardless of what local union they are from, we don't care, just as long as they show us a paid up work card, they get work.

Q. When you say as long as they show a paid up work card, they get the work order, are you referring to a quarterly working card?

A. I'm referring to the quarterly working card, or if a man had been on application to join the union, he would have a temporary card, or a man if he was on a permit, if it was current, would get the work order, yes.

Mr. Heimann: Rather than have your question read back, may I ask if your question related to other locals in the county?

Trial Examiner: Yes.

The Witness: In the county, yes, that is true.

Trial Examiner: Now, in view of your reference to the quarterly working card, in that type of situation, I'd like to ask this, are these men, as a matter of regular practice, asked to show their quarterly working card at the time they sign up or at the time they answer a call for a job?

The Witness: No, just when they answer the

(Testimony of William J. Savage.)

call for a job, [1768] not when they sign up. [1769]

* * * * *

Recross Examination * * * * *

Q. (By Mr. Heimann): I will show you a document that has previously been received as G. C. 28. I ask you if you have seen documents like that before. A. Yes, I have.

Q. Would you tell us if that is the type of document that is issued by the Los Angeles County District Council of Carpenters?

A. Yes, it is.

Q. Have you seen such a document of which you knew it was issued by the Building and Construction Trades Council? A. No. [1771]

* * * * *

Q. Now, when Mr. Dowdall and Mr. Dockery came to see you out at Local 1400 in December, did you tell them to see any particular person at the District Council?

A. I believe I told them that Mr. Earl Thomas was the secretary-treasurer of the Council. [1772]

* * * * *

Q. Now, you testified regarding a black book that listed the contractors with whom the union had contracts in one form or another?

A. That's right, yes, that is true.

Q. And you said that Pardee was in that book, Pardee Construction Company? A. Yes.

Q. And they were in that book in December?

A. Oh, yes.

Q. And for sometime before then?

(Testimony of William J. Savage.)

A. I assume they were, yes.

Q. You don't remember to have received any calls from Pardee for workmen prior to December?

A. Not for quite a while prior to December. [1776] I wouldn't know anyone, I have no idea.

Q. Not for quite a while. Well, did you ever, or let's say, within the three years prior to December, 1953?

A. Oh, yes, I have had calls from Pardee.

Q. You have?

A. Yes, I have had calls in that time, sure.

* * * * *

Mr. Nicoson: I now invite the stipulation with respect to Respondents' Exhibit 5 which is the dues book of Mr. Dowdall that in its present form does not reflect any dues payment beyond the month of March of 1954.

Mr. Heimann: First, I object to any evidence regarding this matter as immaterial, irrelevant.

Trial Examiner: Objection overruled.

Mr. Heimann: Without waiving my objection, I stipulate that, I accept the stipulation as to the fact stated by Mr. Nicoson, to-wit, that the dues book in its present form does not show any dues payment beyond March, 1954. As I say, I stipulate that that is a fact. I do not waive any objection as to the irrelevancy and other objections that I made.

I further wish to state that my stipulation as to that fact is not to be construed as a stipulation that Mr. Dowdall did not pay dues beyond that

date. The stipulation is merely that the dues book does not in its present form reflect any payment beyond that date. [1778]

* * * * *

JAMES ADAMS

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Nicoson): Give your name, please.

A. James Adams.

Q. Where do you reside, Mr. Adams, at the present time?

A. 13313 Ferpinawu Street, Norwalk.

Q. Are you presently employed? A. No.

Q. Were you during the month of January, 1954, employed as business agent of Local 1046 at Palm Springs? [1787]

A. That's right.

Q. Were you the business agent on January 7, 1954, of Local 1046? A. Yes.

Q. I show you a document which is in evidence as General Counsel's Exhibit 30 and ask you to examine and state if that is your handwriting on that card. A. That is my handwriting.

Q. That is a temporary working card that you issued to Mr. Dowdall on that date?

A. That is correct.

Q. Did you at that time have a conversation with Mr. Dowdall? When you issued that card, just answer that yes or no.

(Testimony of James Adams.)

A. No, no conversation other than the conversation that there was 50 men out of work.

Q. Well, now, you just answer me if you talked with him. Did you talk with him before you issued that card?

A. Yes, I did.

Q. While you were talking with him, there were you and Mr. Dowdall there. Now, who else was present?

A. Well, there was the financial secretary.

Q. That is Ted Morris?

A. Yes, at that particular time.

Q. Anyone else that you recall?

A. Yes, Roy Lee. [1788]

Q. Anyone else that you recall?

A. Well, I don't know, there was about 50 men.

Q. You are sure it was Roy Lee, or Leo Kruse?

* * * * *

The Witness: No, not Leo Kruse.

Q. (By Mr. Nicoson): Tell us, Mr. Adams, what you said to Mr. Dowdall and what he said to you on the occasion that this card was filled out and issued to Mr. Dowdall.

A. Well, when he come in that morning, he asked to be put on that work list. I said I couldn't put him on the work list because he was not a member of that local at that particular time. He said he didn't want to go to work, he wanted on there so that he could fill his unemployment out and that is the only way he could draw his unemployment by being on that list. I said the only thing left for me to do, the only way I could put you on

(Testimony of James Adams.)

that list was to work you on a permit, or put you on a permit, which he agreed to do.

Q. State whether or not there was anything said about a dues book.

A. He had his dues book in his pocket and said he wasn't going to put his book in no local here as he was a member of the Alaska local. I think it was Anchorage, I'm not positive on that. [1789]

Q. Was that when you started talking about the permit? A. Yes.

Q. And did you issue this card which is now in front of you?

A. I issued that card, yes.

Q. Did you say anything else to him at that time?

A. Upon issuance of the card like this, of course, it involves the monthly dues which he paid.

Q. How much did he pay?

A. He paid \$5.00.

* * * * *

Q. (By Mr. Nicoson): Now, do you recall anything else that was said at that time?

A. I told him then the only way I could put his name on that was issuing this card and he said that he didn't want to go to work, that he wanted to get on the unemployment list, so I immediately put his name on the out-of-work list. Apparently that is what he wanted.

Q. Anything further that was said?

A. That is all that was said.

Q. You issued that card, I take it?

(Testimony of James Adams.)

A. Yes.

Q. You put his name on the list?

A. I put his name on the list and gave him the number. [1790]

Q. You gave him a number?

A. Approximately, about 50, I can't recall his number at this particular time, approximately.

Q. You looked at the back of the card which the Examiner now turned over for you and noticed the number 61 on there, did you put that on there?

A. Yes, that is my writing. I don't know just how many were out of work, probably around 50 that morning.

Q. Does that number 61 have any significance to you now?

A. Well, the only reason is he was the last on the list, probably.

Q. So far as you now know, that was his number at the time you signed the list, is that right?

A. That's right. [1791]

* * * * *

Cross Examination

Q. (By Mr. Heimann): Mr. Adams, when Mr. Dowdall was at the union hall on January 7, he said that he wanted to register, is that right?

A. Wanted to register for the unemployment, on the unemployment list.

Q. All right. And you told him that at first he couldn't register because he was not a member of the local?

A. What is that again?

(Testimony of James Adams.)

Q. You told him at first that he could not register because [1793] he was not a member of the local? A. That's correct.

Q. At that time you were the business agent of Local 1046? A. Yes.

Q. You handled that out-of-work list, is that right?

A. Yes, sir, in conjunction with the unemployment office. I had to keep the amount of men out of work and give them a number of our own members.

Q. And in referring men to work you went by that out-of-work list? A. By the list, yes.

Q. You took the ones who were on top first?

A. In rotation.

Q. And went down that list? A. Yes.

Q. And you didn't refer anybody to work who was not on that out-of-work list?

A. No. Unless that they went and got a job by themselves, if they got a job by themselves, there was nothing I could do about it, of course.

Q. But you didn't refer him unless he was on the out-of-work list? A. No, no.

Q. And in order to get on the list, he either had to be a member of the local or he had to have a temporary working card? [1794]

A. Well, not exactly a member of the local but a member of the District Council which comprises Riverside and San Bernardino Counties. You could be a member of any one of the 11 locals.

(Testimony of James Adams.)

Trial Examiner: You say 11 locals in the counties?

The Witness: In the two counties, that is correct.

Mr. Heimann: Thank you.

Q. (By Mr. Heimann): So he had to be a member of any one of the locals within the District or he had to get a temporary working card?

A. Yes.

Q. And in order to get a temporary working card, he had to pay the dues that the locals in that district charge? A. Pay a month's dues.

Q. Now, you say that Mr. Dowdall said that he just wanted to be on the list because of the unemployment compensation?

A. Wanted on my list to draw unemployment.

Q. That is what he said? A. Yes.

Q. Did he say anything about his Alaska case?

A. About what?

Q. About his Alaska case?

A. No other than he said his membership was up there, that he had a book in his pocket that his membership, still retained his membership in Alaska.

Q. That is all he said about the Alaska case?

A. Yes, that he was not going to put his book in Palm Springs Local 1046.

* * * * *

Q. Did you always put the names of applicants on the out-of-work list, or did they usually write their own name on it?

A. Well, since the two years ago, since the De-

(Testimony of James Adams.)

partment of Unemployment started that ruling with [1796] the locals in that particular section, I had to do that in order to cooperate with that office there in Indio. That is where the Unemployment Office was established, in Indio, for that area. The men would come there and if I had no work, go there and apply for unemployment.

Q. I understand, but what I'm referring to is, you said you put Mr. Dowdall's name on the list.

A. That's right, I do that with all the names.

Q. You always write the names?

A. The name and number.

Q. The applicant doesn't write his own name on it? A. No.

Q. After January 7, did Mr. Dowdall ever come back to the union office while you were the business agent?

A. He didn't come back there until, I think it was, around about the month of May and I was down in Los Angeles that particular day and a fellow taking my place. He came in for a permit from this other man that was on acting as business agent.

Q. Who was that? A. Roy Lee.

Q. That was May?

A. I presume it was around the month of May. I can't tell the date.

Q. At that time you were still the business agent?

A. Yes, I was the business agent but I was in

(Testimony of James Adams.)

[1797] Los Angeles that particular day and he was going to bat for me.

Q. Between January and May you never saw Mr. Dowdall back at the union office?

A. No. I have seen him working out on the jobs, though.

Q. You didn't actually see him there at that date in May when Mr. Lee was there because you were in Los Angeles?

A. I was in Los Angeles. No, I didn't see him.

Q. So what you just told us is just what you heard that he was in there in May?

A. No, we have in the record, in the book he got a permit.

Q. I see, so you know it from that record?

A. Yes.

Q. That he was there, but you never saw him at the union office again?

A. No, I didn't see him.

Q. What does that record say?

A. The date that they gave him the card, regular card like this, I presume, and the date that was on the card was transferred on to the books of the financial secretary.

Trial Examiner: Let the record show that when the witness testified that Mr. Dowdall was given a card like this, he indicated the the card previously examined by him in connection with his direct examination in evidence as G. C. 30.

The Witness: In other words, from the time that this card was issued, the card is good for one

(Testimony of James Adams.)

month. You see the date on [1798] this card and I know for a fact that he had been working right along and never come in for no permits until the month of May.

Q. (By Mr. Heimann): I see, yes.

A. But he had been working right along, I say, on job, not job, jobs, working over in Desert Hot Springs, also, working in Palm Springs.

Q. He had jobs practically all the time, didn't he? A. Yes, yes.

Q. You never heard that he turned down a job, did you?

A. Not to my knowledge. He never come down near the office, just got a job and went to work without even reporting or anything.

Q. Now, you said that you never referred a man to work unless he was on the list and you added with the exception, of course, if he got his own job.

A. That's right. Sometimes, of course, sometimes the contractors, the different contractors would call up for a certain man and, regardless of the number on the list, I had to meet that request, of course.

Q. That was quite frequent that a man got his own job? A. Many, very frequent, yes.

Q. And I believe there were about 50 or 60 people out of work.

A. There was at that particular time, yes.

Q. About the first of the year. And they went out in the country quite often and looked for jobs, didn't they? [1799]

A. Yes, but they did it in a different way than

(Testimony of James Adams.)

what he would do if they happened to run on to a job.

Q. Just a minute. They went out into the country and looked for jobs, didn't they?

A. They went to the different parts of the territory which would be Desert Hot Springs, Palm Desert, Palm Springs. If they would find a job, they come back and report to the office and I would issue a work order, which was only fair to the men that was out of work.

Q. Did Mr. Dowdall ever tell you that he did not want to go to work? A. What's that?

Q. Did Mr. Dowdall ever tell you that he did not want to go to work?

A. Only this one morning.

Q. What did he say there?

A. He said all he wanted was to get his name on that list, that is all, for unemployment.

Q. Did he ever say that he did not want to go to work?

A. Not to my recollection, no. [1800]

* * * * *

Q. (By Trial Examiner): Mr. Adams, with respect to this out-of-work list that you say you maintain, can you describe the list as it stood at the time that you were business agent and at the time that you maintained it, what sort of paper was it on, how did it look, what information did it contain about each man and so on?

A. Just like a ledger sheet, you know, just like that. The sheet is revised from week to week. You

(Testimony of James Adams.)

know, so many go out and names be dropped as they go out, the names would be crossed off. When they come in on Monday morning, these fellows, probably if there's 50, depending on how many went to work that particular week and they drop that many, if there were six that went out. We had to do that because they kept a number over at the Unemployment Office and I had to give them a number and I gave them the number as they came in. That's the only way we could work it in order for them to clear themselves through the unemployment. [1801]

Q. You say this was a ledger sheet?

A. Just looseleaf, you know.

Q. Lined or unlined? A. Lined.

Q. And you made all the entries on it yourself as each man reported in unemployed?

A. Yes, as they would come in, yes. [1802]

* * * * *

Q. Now, I asked you before about what the situation was as far as giving some indication on the list of those men who reported themselves out of work from one of the other locals from within the District Council's area. Let me ask you this, in the last six months of 1953 and up until the time that your tenure as business agent ended, do you [1805] recall whether within that year you had any occasion to list on the out-of-work list a person who was not a member of one of the locals within the territory of San Bernardino and Riverside District Council? A. Not within 1953, no.

(Testimony of James Adams.)

Q. Did you have any occasion other than insofar as Mr. Dowdall was concerned of listing any person as out of work who had a book in some local outside the jurisdiction of your District Council?

A. No, I couldn't. That is against the rules of the local union and the District Council to list them. The only way they could work was work on a permit.

Q. Specifically, I'm asking did anybody come in and ask for listing on the basis of permit other than Mr. Dowdall?

A. Yes, sir, if outside of the counties.

Q. Well, I'm asking you now whether you now recall any actual occasions on which that occurred.

A. In '53?

Q. In the last six months of '53 and in '54?

A. Outside of Dowdall, that was the only case. That was in '54, not in '53.

Q. Yes, but, if I understand you correctly, even though Dowdall was the only case, your understanding of instructions and appropriate procedure was that if a person came in from outside the District Council's jurisdiction and did not deposit his book, he could only get on the list after getting a [1806] temporary working card?

A. Or permit, not a card, permit, yes.

Q. I'm going by the language of General Counsel's 30. General Counsel's 30 is headed "Temporary Working Card"? A. That's right.

Q. That is what we are talking about?

A. Yes. [1807]

* * * * *

(Testimony of James Adams.)

Q. Mr. Adams, at the time that you were business agent—first of all, let me ask this, what was your term of office as business agent, from year to year?

A. From June to June.

Q. Well, for convenience, then, I will ask you about the situation during your last year of service as business agent which, in fact, ran through the last six months of 1953 and the first six months of '54?

A. Yes.

Q. There's been received in evidence in this proceeding certain documents which have been identified as General Counsel's 3 and General Counsel's Exhibit No. 19. During the [1808] period of time that you served as business agent of Local 1046, did you ever see those documents, or ones identical with them in printing and in format?

* * * * *

The Witness: Yes, I have.

Q. (By Trial Examiner): Would you describe the circumstances under which you saw them, did you have in your possession such books?

A. At least, I recall getting one from the District Council.

* * * * *

Q. (By Trial Examiner): Let me put it this way, which of the two exhibits here appears to be a printed book identical in form and content with the one you received from the District Council?

A. I think this is the one here.

Trial Examiner: Let the record show the wit-

(Testimony of James Adams.)

ness indicates by pointing to General Counsel's Exhibit 3.

Mr. Garrett: The record ought to show he hasn't looked inside the book, too.

Trial Examiner: If that is material, the record will show he flipped the pages. He did not examine every page, that is true.

Q. (By Trial Examiner): In your capacity as business agent of Local 1046, Mr. Adams, was it your responsibility to maintain records or to be aware of contractors operating within the jurisdiction of Local 1046 who had some sort of contractual commitment with your organization insofar as [1810] wages, hours and working conditions were concerned? A. Yes.

Q. There's been testimony in this proceeding that some contractors operating within the area jurisdiction of Local Unions maintained a contractual relationship with the Carpenters organization either through the local or the District Council or whatever the situation may be on the basis of what has been called a short form agreement — off the record.

(Discussion off the record.)

Trial Examiner: On the record.

While we were off the record and seeking for a copy of Respondents' Exhibit 6, I was advised by Mr. Nicoson on behalf of the Respondent Unions that he would be in a position to enter into a stipulation with respect to the answers that Mr. Adams might give when questioned with respect to the

(Testimony of James Adams.)

use, if any, of a contract similar to Respondents' Exhibit 6 in the territory of Local 1046.

Mr. Nicoson: Yes, and that the witness' answer would be substantially the same as those put by Mr. Jensen to the similar questions which the Trial Examiner put to Mr. Jensen on the same subject.

Trial Examiner: So stipulated?

Mr. Heimann: I think so. Let me just look over Mr. Jensen's testimony. [1811]

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

As a result of the discussion off the record, Mr. Nicoson has indicated on behalf of respondent unions that he is willing to stipulate with respect to the entire line of examination that I developed in my questioning of Mr. Jensen with respect to the use not only of contract similar to Respondents' 6 but, also, with respect to the use of documents similar to General Counsel's 3.

Would you state that stipulation for the record?

Mr. Nicoson: Yes, I am willing to stipulate that if the same or similar questions were asked by the Trial Examiner or anyone else of Mr. Adams as were presented to Mr. Jensen in regard to these two subjects which the Trial Examiner just asked, Mr. Adams would give the same or, substantially the same, answers with respect to the application and procedures followed under those two documents.

Mr. Heimann: I will so stipulate. [1812]

* * * * *

(Testimony of James Adams.)

Recross Examination

Q. (By Mr. Heimann): Mr. Adams, on January 7 when Mr. Dowdall, when you put Mr. Dowdall's name on the list on the [1827] out-of-work list——

A. Yes.

Q. ——did you say to him that that did not entitle him to go to work?

A. No, that is merely for record for out of work.

Q. I know, you so testified. My question is, didn't you tell them that the fact that his name was on the list did not entitle him to go to work?

A. No, I didn't tell him that because I couldn't put him to work anyway because 50 men were out of work, I had no jobs.

Q. Yes. Didn't you say to him that that was for unemployment only, for the unemployment compensation only but that that didn't give him the right to go to work?

A. I merely stated there that by placing the name on that list he would go out in rotation with the rest of the men and, also, for the unemployment office, his name and number.

Q. And did you tell him that until his name came up he could not——

A. He said he didn't want to work.

Q. He said he didn't want to work?

A. He said he merely wanted his name on there on draw unemployment insurance.

Q. Did he say he didn't want to work or didn't ask you to send him to work?

A. That's right. [1828]

(Testimony of James Adams.)

Trial Examiner: Which?

The Witness: He said he didn't want to go to work, said he wanted his name on the list for unemployment insurance.

Q. (By Mr. Heimann): Is that what he said or he didn't ask you to send him to work?

A. Mean's the same thing, don't it?

Q. Maybe it does to you. That is about what he said? A. Yes. [1829]

* * * * *

CLARENCE A. DOWDALL

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

* * * * * [1872]

Q. (By Mr. Heimann): Have you declined a job since January, 1954, that was offered you?

A. No, sir.

Q. About how many jobs have you held since January, '54?

A. I probably worked for about six different, since the 1st of January, I worked probably for about six different people.

Q. And on these six jobs—are you working at the present time? [1887] A. Yes, sir.

Q. So the five jobs preceding the present job, were you laid off or did you quit?

A. I was laid off.

(Testimony of Clarence A. Dowdall.)

Q. After you were laid off, did you promptly look for other work?

A. I have, yes, sir. [1888]

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 17 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 17

MEMBERSHIP ROSTER

Southern California Chapter

Founded 1896

Affiliated with A.G.C.—1920

The Associated General Contractors of America

707 Architects Building

816 West Fifth Street

Los Angeles 17, Calif.

MAdison 1381

(AGC Cut)

Skill - Integrity Responsibility

July, 1953

* * * * *

Active Members

* * * * *

Macco Corporation, 14409 Paramount Blvd., Paramount, NEvada 6-1261.

* * * * *

Morrison-Knudsen Company, Inc., 810 Title Guarantee Bldg., 411 West 5th Street, 13, MUtual 1123.

* * * * *

Twaits Co., Ford J., 449 South Beaudry St., 17,
MUtual 5163. * * * * * [1896]

Trial Examiner: Should our notes and mutual recollection disagree in any respect in error, I will now state for the record that it is my intention to receive in evidence and they are hereby received in evidence, General Counsel's 1-A through NN, inclusive, General Counsel's 3, General Counsel's 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21 through 25-A, B, C and D, inclusive, 27 through 36 inclusive, and General Counsel's 41 and 42.

With respect to Respondents' exhibits, my notes show that the respondent unions identified for the record and offered 12 exhibits, and with respect to these 12 exhibits, my notes show that Respondents' 1 through 4, inclusive, were offered and received in duplicate.

With respect to Respondents' Exhibit 5, Mr. Dowdall's old dues book, my notes show that the exhibit, after its identification, was subsequently withdrawn.

With respect to Respondents' 6 and 7, my notes show that the exhibits were offered and received in duplicate.

With respect to Respondents' 8, the envelope of a registered letter dispatched by respondent unions to Mr. Dowdall, I don't show that the exhibit after its identification was withdrawn. Does the respondent unions have any present intention with respect to another disposition of that exhibit?

Mr. Nicoson: No, we are content to leave it as withdrawn. [1902]

Trial Examiner: Very well.

(Thereupon the document heretofore marked Respondents' Exhibit No. 8 for identification was withdrawn.)

Trial Examiner: My notes show that Respondents' 9 through 12-A and B, inclusive, were offered and received in evidence in duplicate.

Does that statement of the record as my notes show it in respect to the state of respondents' exhibits jibe with the recollection and notes of counsel?

Mr. Nicoson: Correct here. * * * * * [1903]

CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the 21st Region in the matter of: Local No. 1400, United Brotherhood of Carpenters and Joiners of America, AFL, etc., and Clarence A. Dowdall, An Individual, Case No. 21-CB-548, etc., Los Angeles, California, August 16, 1954-November 4, 1954, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY,
Official Reporters

/s/ By ADELE HENNINGSEN,
Field Reporter

No. 15167

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**LOCAL No. 1400, UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO; LOS ANGELES
COUNTY DISTRICT COUNCIL OF CARPENTERS, UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS OF AMER-
ICA, AFL-CIO; LOCAL No. 1046, UNITED BROTH-
ERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO; AND SAN BERNARDINO AND RIVERSIDE
COUNTIES DISTRICT COUNCIL OF CARPENTERS, RE-
SPONDENTS**

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

KENNETH C. McGUINESS,
General Counsel,

STEPHEN LEONARD,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

**FREDERICK U. REEL,
ABRAHAM SIEGEL,**
*Attorneys,
National Labor Relations Board.*

FILED

JAN 21 1957

INDEX

	Page
Jurisdiction	1
Statement of the case.....	2
I. The Board's findings of fact.....	2
A. The activities of BCA and AGC.....	2
B. The unfair labor practices.....	4
1. The terms of the contract.....	4
2. Respondents' discrimination against nonmem- bers.....	6
3. The discrimination against Dowdall and Dockery.....	7
II. The Board's conclusions of law.....	10
III. The Board's order.....	12
Argument	12
I. The unfair labor practices affect commerce within the meaning of the Act.....	12
II. The Board properly held that respondents violated Section 8 (b) (1) (A) and (2) of the Act.....	15
A. Introduction: Substantial evidence supports the Board's findings.....	15
B. By requiring Dowdall and Dockery to obtain tem- porary working permits for a fee, Local 1400 and the Los Angeles District Council violated Section 8 (b) (2) and (1) (A) of the Act.....	17
C. The policy of Local 1046 and the San Bernardino and Riverside District Council of not making the Lo- cal's registration and referral facilities equally available to members and nonmembers violated Section 8 (b) (2) and (1) (A) of the Act.....	19
D. By causing Dowdall, under pain of forfeiting his unemployment insurance, to pay a fee for a work permit, Local 1046 and the San Bernardino and Riverside District Council coerced him into con- tributing financial assistance to the Unions and penalized him because of his nonmembership thereby violating Section 8 (b) (1) (A) of the Act.....	21
III. The Board's order is valid and proper.....	24
Conclusion	28
Appendix.....	29

AUTHORITIES CITED

Cases:

<i>A. M. Andrews Co. v. N. L. R. B.</i> , 236 F. 2d 44 (C. A. 9).....	13
<i>American Newspaper, Inc.</i> , 22 N. L. R. B. 899.....	27
<i>American Newspaper Publishers Ass'n v. N. L. R. B.</i> , 193 F. 2d 782 (C. A. 7), certiorari denied, <i>I. T. U. v. N. L. R. B.</i> , 344 U. S. 816	21, 27

Cases—Continued

	Page
<i>Douglas v. I. B. E. W.</i> , 146 F. Supp. 68 (W. D. Mich.)	12
<i>Joliet Contractors Ass'n v. N. L. R. B.</i> , 193 F. 2d 833 (C. A. 7)	12, 14
<i>Katz v. N. L. R. B.</i> , 196 F. 2d 411 (C. A. 9)	13
<i>Leonard v. N. L. R. B.</i> , 197 F. 2d 435 (C. A. 9)	13
<i>Meier & Frank Co., Inc.</i> , 89 N. L. R. B. 1016	27
<i>N. L. R. B. v. American Laundry Machinery Co.</i> , 152 F. 2d 400 (C. A. 2)	27
<i>N. L. R. B. v. George D. Auchter Co.</i> , 209 F. 2d 273 (C. A. 5) 4	17, 24
<i>N. L. R. B. v. Baltimore Transit Company</i> , 140 F. 2d 51 (C. A. 4), certiorari denied, 321 U. S. 795	26
<i>N. L. R. B. v. Cantrall</i> , 201 F. 2d 853 (C. A. 9), certiorari denied, 345 U. S. 996	13, 17
<i>N. L. R. B. v. Daboll</i> , 216 F. 2d 143 (C. A. 9), certiorari denied, 348 U. S. 917	17
<i>N. L. R. B. v. Eclipse Lumber Co.</i> , 199 F. 2d 684 (C. A. 9)	22, 26
<i>N. L. R. B. v. Franks Bros. Co.</i> , 321 U. S. 702	27
<i>N. L. R. B. v. Gibson County Electric Corp.</i> , 177 F. 2d 203 (C. A. 6), enforcing 74 N. L. R. B. 1414	27
<i>N. L. R. B. v. Haddock Engineers</i> , 215 F. 2d 734 (C. A. 9)	13
<i>N. L. R. B. v. International Ass'n of Machinists, Local No. 504</i> , 203 F. 2d 173 (C. A. 9)	22
<i>N. L. R. B. v. International Longshoremen's and Warehousemen's Union, Local 10</i> , 210 F. 2d 581 (C. A. 9)	19
<i>N. L. R. B. v. International Union of Operating Engineers, Local 12</i> , 237 F. 2d 670 (C. A. 9)	18, 19, 20, 25
<i>N. L. R. B. v. Local 404, International Brotherhood of Teamsters</i> , 205 F. 2d 99 (C. A. 1)	25, 26
<i>N. L. R. B. v. Local 420</i> , 39 L. R. F. M. 2173, December 11, 1956, (C. A. 3), enforcing 111 N. L. R. B. 1126	26
<i>N. L. R. B. v. Local 743, United Brotherhood of Carpenters and Joiners</i> , 202 F. 2d 516 (C. A. 9)	17, 19
<i>N. L. R. B. v. Mackay Radio & Telegraph Co.</i> , 304 U. S. 333	25
<i>N. L. R. B. v. Murphy's Motor Freight, Inc.</i> , 231 F. 2d 654 (C. A. 3)	22
<i>N. L. R. B. v. Osbrink</i> , 218 F. 2d 341 (C. A. 9), certiorari denied, 349 U. S. 928	21
<i>N. L. R. B. v. Parker Bros. & Co.</i> , 209 F. 2d 278 (C. A. 5)	26
<i>N. L. R. B. v. Pecheur Lozenge Co.</i> , 209 F. 2d 393 (C. A. 2), certiorari denied, 347 U. S. 953	21
<i>N. L. R. B. v. Philadelphia Iron Works, Inc.</i> , 211 F. 2d 937 (C. A. 3)	22, 24
<i>N. L. R. B. v. Phillips Gas & Oil Co.</i> , 141 F. 2d 304 (C. A. 3)	27
<i>N. L. R. B. v. Reed</i> , 206 F. 2d 184 (C. A. 9)	12
<i>N. L. R. B. v. Salant & Salant, Inc.</i> , 183 F. 2d 462 (C. A. 6)	26
<i>N. L. R. B. v. Seven-Up Bottling Co.</i> , 344 U. S. 344	26
<i>N. L. R. B. v. Spicwak and Sons</i> , 179 F. 2d 695 (C. A. 3)	26
<i>N. L. R. B. v. Sunbeam Electric Mfg. Co.</i> , 133 F. 2d 856 (C. A. 7)	27
<i>N. L. R. B. v. Swinerton</i> , 202 F. 2d 511 (C. A. 9), certiorari denied, 346 U. S. 814	17, 19

III

Cases—Continued		Page
<i>N. L. R. B. v. Syracuse Stamping Co.</i> , 208 F. 2d 77 (C. A. 2)-----		21
<i>Phelps-Dodge Corp. v. N. L. R. B.</i> , 313 U. S. 177-----	17, 22, 23	
<i>Radio Officers' Union v. N. L. R. B.</i> , 347 U. S. 17-----		21
<i>Shartle Bros. Machine Co.</i> , 60 N. L. R. B. 533-----		27
<i>Shore v. Building & Construction Trades Council</i> , 173 F. 2d 678 (C. A. 3)-----		12
<i>United Association of Journeymen v. Marchese</i> , 302 P. 2d 930--	12, 13, 14	
<i>Virginia Electric & Power Co. v. N. L. R. B.</i> , 319 U. S. 533----	25, 26	
<i>Tomlinson of High Point, Inc.</i> , 74 N. L. R. B. 681-----		27
Statute:		
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 <i>et seq.</i>):		
Section 7-----		12
Section 8 (a) (1)-----		17
Section 8 (a) (3)-----		11
Section 8 (b) (1) (A)-----	2, 15, 17, 19, 21	
Section 8 (b) (2)-----	2, 15, 17, 19	
Section 10 (b)-----		21
Section 10 (e)-----		1
Miscellaneous:		
N. L. R. B. <i>Eleventh Annual Report</i> (Gov't Print. Off., 1947), p. 49--		27
N. L. R. B. <i>Twelfth Annual Report</i> (Gov't Print. Off., 1948), p. 40--		27
N. L. R. B. <i>Sixteenth Annual Report</i> (Gov't Print. Off.), pp. 239, 240-245 -----		27

In the United States Court of Appeals for the Ninth Circuit

No. 15167

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL No. 1400, UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO; LOS ANGELES
COUNTY DISTRICT COUNCIL OF CARPENTERS, UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS OF AMER-
ICA, AFL-CIO; LOCAL No. 1046, UNITED BROTH-
ERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO; AND SAN BERNARDINO AND RIVERSIDE
COUNTIES DISTRICT COUNCIL OF CARPENTERS, RE-
SPONDENTS

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondents on January 20, 1956 (R. 297-317)¹ and reported at 115 N. L. R. B. 126. This Court has jurisdiction under Section 10 (e) of

¹ References to portions of the printed record are designated "R". Where, in a series of references, a semicolon appears, references preceding the semicolon are to the Board's findings and later references are to the supporting evidence.

the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*),² the unfair labor practices having occurred in and around Los Angeles and Palm Springs, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that the several respondent labor organizations violated Section 8 (b) (1) (A) and (2) of the Act by requiring nonmembers to pay fees for permits and working cards, which fees were not required of members. The Board further found that these unfair labor practices affected "commerce" within the meaning of the Act because they were committed under color of respondents' contracts with Building Contractors Association of California (hereinafter called BCA) and Associated General Contractors, Southern California Chapter (hereinafter called AGC), the members of both of which are engaged in construction activities affecting interstate commerce. The evidence in support of these findings may be summarized as follows:

A. The activities of BCA and AGC

AGC and BCA are trade associations admitting to membership firms engaged in construction work in Southern California (R. 57, 59; 496-498, 541-543).³

² The relevant statutory provisions are reprinted *infra*, pp. 29-32.

³ General Counsel's Exhibit 17 and 23 (R. 532, 844), not reproduced in full in the printed record, show that BCA embraces approximately 500 construction contractors and AGC has over 300 members.

The record discloses that among the construction work performed by AGC members were a 12 million dollar project constructed between April 15, 1952, and March 31, 1954, for the United States Marine Corps at Twentynine Palms, California, and a 10 million dollar project constructed between June 1, 1953, and September 29, 1954, for the United States Army at Las Vegas, Nevada (R. 60-61; 458-474, 494-495, 509-520, 516-518, 844-845). The record further discloses that among the construction work performed by BCA members in 1953 was \$700,000 worth of work on facilities of the B. F. Goodrich Company, a firm admittedly engaged in interstate commerce (R. 57-58, 67; 532, 638-642, 649). Among the members of BCA is Pardee Construction Company, a partnership comprised of three brothers who, through this Company and through other companies in which the brothers individually are sole or controlling stockholders, are engaged in extensive construction work in California and Nevada (R. 51-57, 63-64; 348-366, 372-378, 443-452).⁴

AGC and BCA regularly execute identical contracts known as "Master Labor Agreements" with a group of labor organizations, including representatives of respondents, governing labor relations in the construc-

⁴ The various Pardee enterprises are all operated out of the main office of Pardee Construction Company in Santa Monica, California, where some employees "are employed by the specific entity for whom they are working" while other employees such as "office managers and head accountants and so forth" render service to all the Pardee enterprises (R. 57; 360-361). Between 1952 and 1954, over 40 percent of the \$6½ million income of the Pardee enterprises was derived from construction services in Nevada (R. 56-63; 443-451).

tion industry in Southern California (R. 85-89; 456, 475-481, 496-500, 522-523, 536-546). All members of AGC and BCA were considered signatory to these contracts, the terms of which are discussed in the following paragraph, and the construction projects referred to above were performed under those contracts (R. 94-95, 113; 513, 530-537, 763-766, 821-822, 840-841). Construction contractors who are not members of either AGC or BCA are normally required by the unions to agree to abide by the master agreement (R. 713-714, 758-759).

B. The unfair labor practices

1. The terms of the contract

The Master Labor Agreements provide in Article II-A that the employers recognize the unions as bargaining representative of the employees over whom the unions have jurisdiction and further provide that employees must become union members not more than thirty days after being employed. (R. 88-89; 498-500, 543-544). The contract then provides for a dispatch system in the following terms (R. 89-90; 500-501, 545-546) :

B. That in the employment of workmen for all work covered by this Agreement in the territory above described, the following provisions, subject to the conditions of Article II-A, above, shall govern:

1. That the Local UNIONS shall establish and maintain open and nondiscriminatory employment lists for employment of workmen in the work and area jurisdiction of each respective Local UNION of each particular trade.

That the CONTRACTORS shall first call upon the respective Local UNIONS having work and area jurisdiction, or their Agents, for such men as they may from time to time need, and the respective Local UNIONS, or their Agents, shall immediately furnish to the CONTRACTORS the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the CONTRACTORS.

That the respective Local UNIONS, or their Agents, will furnish each such required competent workman or skilled mechanic entered on their lists, to the CONTRACTORS by use of a written referral and will furnish such workmen or skilled mechanics from the respective Local UNIONS listings in the following manner:

(a) Workmen who have been recently laid off or terminated in that respective Local UNION's work and area jurisdiction by the CONTRACTORS now desiring to re-employ the same workmen in that same area provided they are available for employment.

(b) Workmen who have been employed by CONTRACTORS in the respective Local UNION's work and area jurisdiction within the multiple-employer unit during the previous ten (10) years, and are available for employment.

(c) Workmen whose names are entered on the list of the respective Local UNION having work and area jurisdiction and who are available for employment.⁵

⁵ Article II-B further provides that if the Local Unions do not, within 48 hours after appropriate notice from the Contractors, furnish the required workmen, the Contractors are entitled to obtain such workmen from other sources but are to report the names of such workmen to the Local Union having work and area jurisdiction (R. 91; 501, 546).

2. Respondents' discrimination against nonmembers

Both Local 1400 and Local 1046 maintain "out-of-work" registers pursuant to the union-security provisions of the Master Labor Agreements described above (R. 298, 302, 131, 139, 160, 170; 672, 673, 705, 752). The practice of the two Locals with respect to these registers is substantially the same. Thus, local members and members of locals affiliated with the respective district councils sign the register so long as they are current in their dues payments (R. 131, 152, 172; 705-707, 831-832). However, in the case of Local 1400's list, members of locals outside the jurisdiction of the Los Angeles District Council "had to be cleared through the Local or through the Council before they could sign the list" (R. 149-150, 152; 702, 704, 707, 809). As explained by representatives of respondent Los Angeles District Council, and of respondent 1400 "clearing through the Council" means obtaining a temporary work card, good for 30 days, from the Council (R. 152; 701-704, 707-708, 710, 809). They further explained that the foreign members' fees for these temporary work cards are the equivalent of one month's local dues, and that the Council retains these monies "for bookkeeping purposes," although regular local dues are apportioned among the local, the District Council, and the International (R. 127; 710-712).⁶

Similarly, members of foreign locals not wishing to transfer their membership into Local 1046 must ob-

⁶ Foreign members who indicate a desire to join Local 1400 also have to obtain temporary work cards. These, however, are issued by the Local, without cost to the applicant (R. 149-150; 707-710, 812).

tain District Council temporary work cards before signing the Local 1046 list, while members of "any of the 11 locals" comprising the San Bernardino and Riverside District Council can sign the list without such a card (R. 301-302, 172; 831-832). The charge for a temporary work card is the equivalent of one month's local dues (R. 140; 832).⁷

3. The discrimination against Dowdall and Dockery

The experience of Clarence Dowdall and J. H. Dockery illustrates how this system operates. Both men were experienced carpenters, and long-time members of various Carpenters' locals (R. 117; 378-379, 555-556, 599). Early in 1953, each of them independ-

⁷ The "By-Laws and Trade Rules" of the San Bernardino and Riverside District Council provide, *inter alia* (R. 777-778):

ARTICLE I

"SECTION 1. Members coming into the District Council's jurisdiction shall obtain a San Bernardino and Riverside Counties' District Council working card or permit before seeking employment. Failure to comply with this section will be fined not less than twenty-five dollars (\$25).

*

*

*

*

*

ARTICLE II

"SECTION 3. All members in the jurisdiction of this Council shall be given the opportunity of being employed before calling outside Locals for men. No Local in this District Council shall require a transfer of membership or charge a permit fee of a member of another Local affiliated with this District Council * * *

"SECTION 4. Any member from another Local outside of this District Council taking out a temporary working card prior to the 25th of the month, must pay for the current month. Monthly working cards shall be the same as our dues * * *"

(Section 4, quoted here, was inadvertently omitted from the printed record before this Court.)

ently moved to Alaska, transferring his union membership to Local 1281, in Anchorage—Dockery from Local 1400 in Los Angeles, and Dowdall from Local 1046 in Palm Springs (R. 118; 415, 442, 556). Thereafter, in the fall of 1953, both returned to the Los Angeles area (R. 119; 439, 624-625). On December 2, 1953, Dowdall and Dockery sought work at Pardee's Pacific Palisades project (R. 120-122; 379-383, 557-558). There, Superintendent Lancaster informed them that he had two openings for carpenters, and instructed them to clear first through Local 1400 (R. 122-124; 384, 559-560). On the following morning, December 3, 1953, Dowdall and Dockery reported to Local 1400's office and requested referrals to the Pardee project (R. 124; 385, 426, 563-564, 793-794). Savage, the Local's dispatcher, informed the two applicants that since they were members of the Alaska Local they would have to procure temporary work cards from the District Council (R. 125; 389, 427, 571, 794-795). Dowdall and Dockery then proceeded to the District Council and obtained the required temporary work cards for which they paid \$3.00—the equivalent of the monthly dues then in effect in the Carpenters Locals affiliated with the District Council—although they were current in their dues to the Alaska Local (R. 127; 390-393, 412, 415, 566, 573-575, 577-579, 598). They then returned to Local 1400's hall where Savage and Business Representative O'Hare informed them that the Local could not refer them to the Pardee job. O'Hare explained that under the Master Labor Agreement employers were pledged to hire only through union halls (R. 129; 395, 581-582, 680-684, 797-799,

800).⁸ When Dowdall and Dockery asked what they had to do to secure employment, O'Hare told them to sign the Local's "out-of-work" list, which they did (R. 130-131; 396, 582-584, 680-684, 685, 700-701, 799). Thereafter, on January 4, 1954, and February 13, 1954, Dockery obtained additional temporary work cards from the District Council, paying \$4.00 for each card (R. 136; 406-412).

Dowdall, however, transferred his job-seeking activities to the Palm Springs, California, area. Early in January, his quest for work having proved fruitless, Dowdall reported to the Indio local office of the California State Employment Service to file a claim for unemployment insurance (R. 138, 302; 585-586). There he was advised that as a union member he would have to register for work with a Carpenters' local and obtain evidence of such registration from the local's business agent before he could file his claim (R. 138, 302-303; 586). Accordingly, Dowdall attempted to register with Local 1046, to which he had once belonged (R. 139, 302-303; 586-587). However, Business Agent Adams at first refused to permit Dowdall to sign the "out-of-work" list because he was not a member of Local 1046, despite Dowdall's explanation that his sole purpose was to qualify for unemployment insurance. Adams finally relented and permitted Dowdall to sign the list only when he agreed to pay a \$5.00 fee for a temporary work card (R.

⁸ O'Hare also warned Dowdall and Dockery that under the Union's by-laws they were subject to a fine for attempting to procure their own jobs without first "clearing" into a Los Angeles local or securing a temporary work card from the District Council (R. 130; 397, 440-441, 582, 683, 700).

139-140, 303; 589-590, 598, 723, 827-831).⁹ Adams, however, told Dowdall:

You understand that you are not going to work on this permit here in Riverside County at all because I'm not honoring no permits. You have to clear into this local before you can go to work (R. 139-140; 589).

Thereafter Dowdall, on his own, secured employment at Desert Hot Springs, California (R. 141-142; 591-592). Finally, on May 3, 1954, Dowdall, to "keep straight" with the Union, obtained another District Council "Temporary Working Card" for which he again paid \$5.00 (R. 142-143; 595-597, 598, 732, 833-834).

II. The Board's conclusions of law

Upon the foregoing facts the Board concluded that the practices here involved affect commerce within the meaning of the Act (R. 62-72, 298). The Board further concluded that, in view of their exclusive referral rights under the contracts, respondents Local 1400 and Los Angeles District Council violated Sections 8 (b) (2) and (1) (A) of the Act by requiring Dowdall and Dockery to obtain temporary working cards for a fee from the District Council in order to qualify for registration on the Local's "Out-of-Work" list and for referral to a job (R. 298-299). Pointing out that members of Local 1400 and other locals affiliated with the District Council were not required

⁹ The card, a District Council "Temporary Working Card," is dated January 7, 1954, and signed by Adams, who was President of the District Council as well as Business Agent of Local 1046 (R. 140; 598, 653).

to pay similar fees for the use of the Local's registration and referral facilities, the Board held that "[t]his disparate treatment which Dowdall and Dockery could have avoided only by transferring their membership into Local 1400, is a form of discrimination in employment that necessarily encourages membership in a labor organization within the meaning of Section 8 (a) (3) of the Act" (R. 299).¹⁰

The Board further found that respondents Local 1046 and San Bernadino and Riverside District Council similarly violated Section 8 (b) (2) and (1) (A) of the Act "by not making Local 1046's registration and referral facilities available to members and non-members on the same terms and conditions" (R. 301-302). Finally, the Board, one member dissenting, held that respondents Local 1046 and its District Council additionally violated Section 8 (b) (1) (A) of the Act by "requiring Dowdall to procure a temporary working card for a fee as a condition for registering on the 'Out-of-Work' list" (R. 302, 311-313). The Board majority noted that by this act "Local 1046 coerced Dowdall, under pain of forfeiting his right to unemployment compensation, into contributing financial support to Local 1046 in the form of a fee for a working card" and that such "economic coercion of financial contributions" invades the employee's right to refrain from assistance to the Union and hence violates the Act (R. 303). More-

¹⁰ The Board, reversing the Trial Examiner, dismissed allegations in the complaint that these respondents violated the Act by failing properly to advise Dowdall and Dockery as to the reporting and registration procedures and refusing to honor Pardee's request for the two men (R. 299-301).

over, held the Board, such conduct coerced Dowdall "in the exercise of his right not to join Local 1046," further impinging on his rights under Section 7 of the Act (R. 304).

III. The Board's order

The Board ordered respondents to cease and desist from the unfair labor practices found and from any like or related violations of the Act (R. 306-311). Affirmatively, the Board ordered respondents to refund to Dowdall and Dockery the fees they were required to pay for their temporary working cards and to post appropriate notices. The respondent District Councils were further ordered to publish the notices in newspapers of general circulation in the counties involved (R. 305-311).

ARGUMENT

I

The unfair labor practices affect commerce within the meaning of the Act

The practices involved in this case occurred pursuant to the Master Labor Agreement, which governs labor relations in the construction industry in Southern California. That this industry affects interstate commerce is well settled. See, e. g., *N. L. R. B. v. Reed*, 206 F. 2d 184, 186 (C. A. 9); *Shore v. Building & Construction Trades Council*, 173 F. 2d 678, 681 (C. A. 3); *Joliet Contractors Assn. v. N. L. R. B.*, 193 F. 2d 833, 838-844 (C. A. 7); *Douglas v. I. B. E. W.*, 136 F. Supp. 68, 72-73 (W. D. Mich.); *United Assn. of Journeymen v. Marchese*, 302 P. 2d 930, 933, — Ariz. —.

In asserting jurisdiction in this case the Board could properly note that AGC and BCA are trade associations bargaining on behalf of their employer members for a single contract, and accordingly the Board could appropriately consider the effect of their combined businesses on interstate commerce. See *Leonard v. N. L. R. B.*, 197 F. 2d 435, 436, n. 1 (C. A. 9); *Katz v. N. L. R. B.*, 196 F. 2d 411, 413 (C. A. 9); *Marchese, supra*. Moreover, the record shows that several of the contractors party to this Master Agreement engaged in multi-million dollar construction projects affecting commerce.¹¹

Nor can there be any doubt that, as found by the Board, respondent unions were parties to identical collective bargaining agreements with AGC and BCA. Union officials O'Hare, Savage, Adams, and Jensen, as well as BCA Executive Vice President Sills and AGC Labor Relations Director Boyce, all testified that the contracts printed and distributed by AGC and

¹¹ The Board's findings as to the interstate business activities of the various AGC and BCA member firms are based on the credited and uncontradicted testimony of officials and employees of these firms. In addition, the finding as to Pardee is based on the testimony of the Company's attorney and its chief accountant. This evidence "could properly be considered by the Board in determining whether this was such a case as would warrant its taking jurisdiction, and in no sense could it, in this respect, be bound by the hearsay evidence rule." *N. L. R. B. v. Cantrall Co.*, 201 F. 2d 853, 855 (C. A. 9), certiorari denied, 345 U. S. 996; cf. *N. L. R. B. v. Haddock Engineers, Ltd.*, 215 F. 2d 734 (C. A. 9). Furthermore, the record warrants the Board's finding that Pardee formed part of a "'web' of business activities, currently dominated and controlled by the three Pardee partners" (R. 53). Accordingly, the Pardee companies are an "integrated enterprise" constituting a single "employer" within the meaning of the Act. See *Andrews Co. v. N. L. R. B.*, 236 F. 2d 44 (C. A. 9).

BCA were the collective bargaining agreements in effect during the winter and spring of 1953-1954, the period during which respondents committed the unfair labor practices here involved. In these circumstances, the Board properly affirmed the Trial Examiner's conclusion that (R. 116-117):

The contractors and the unions "signatory" to each of the Master Labor Agreements now under consideration certainly conducted themselves, at all material times, as if they were privy to a contractual relationship. In the light of such conduct on their part, a conclusion that they were, then, contractually bound * * * would certainly seem to be warranted.

Where, as here, employers bargain as a group with the representatives of their respective employees, any labor dispute that might arise, whether the result of the employers' or unions' unfair labor practices, would have the inevitable tendency to disrupt the operations of all the participating employers and bring about a serious interruption to the free flow of interstate commerce. Accordingly, the Board's exercise of jurisdiction over the unions herein, who are the collective bargaining representatives of employees of the employer members of AGC and BCA, was clearly warranted on the basis of the "totality" of operations of all the employer-members of each association. See *Joliet Contractors Assn. v. N. L. R. B.*, 193 F. 2d 833, 840 (C. A. 7), and the *Marchese* and other cases cited *supra*, p. 12.

II

**The Board properly held that respondents violated Section 8
(b) (1) (A) and (2) of the Act****A. Introduction: Substantial evidence supports the Board's findings**

The instant case raises no material issues of fact. As we have shown above, pp. 3-5, respondent unions have identical collective bargaining agreements with AGC and BCA granting respondents the exclusive right to refer applicants for employment to the associations' members on a nondiscriminatory basis. The testimony of union officials O'Hare and Savage, along with that of the complainants, Dowdall and Dockery, establishes that respondents Local 1400 and Los Angeles District Council required Dowdall and Dockery to obtain a temporary working card for a fee from the District Council in order to qualify for registration on Local 1400's "Out-of-Work" list and for referral to a job, while not requiring members of Local 1400 and other locals affiliated with the District Council to pay a similar fee (R. 389-397, 427, 570-582, 680-685, 701-712, 785-795).

Similarly, the testimony of union officials Adams and Jensen accords with the "By-Laws and Trade Rules" of the San Bernardino and Riverside District Council, and establishes that job applicants who were not members of Local 1046 or other local unions affiliated with the San Bernardino and Riverside District Council could not register for employment on Local 1046's "Out-of-Work" list unless they paid a fee for

a temporary working card which members of these organizations were not required to pay (R. 771-772, 777-778, 831). Moreover, Business Agent Adams told Dowdall that he could not work in the area without transferring his membership into Local 1046. Adams admitted that he would not accept Dowdall's registration because he was not a member of Local 1046, despite Dowdall's assurance that his sole purpose for registering was to qualify for unemployment compensation, and not to seek work through the Union. Adams also testified that he relented only when Dowdall agreed to pay a \$5.00 fee for a temporary working card (R. 828-830, 836).

In these circumstances, the issues before this Court raise primarily questions of law: namely, (1) whether respondents Local 1400 and Los Angeles District Council violated Section 8 (b) (2) and (1) (A) of the Act by requiring Dowdall and Dockery to obtain temporary working cards for a fee in order to qualify for registration on the "Out-of-Work" list and referral to jobs; (2) whether respondents Local 1046 and San Bernardino and Riverside District Council violated Section 8 (b) (2) and (1) (A) of the Act by not making Local 1046's registration and referral facilities available to members and nonmembers on the same terms and conditions; and (3) whether respondents Local 1046 and its parent District Council independently violated Section 8 (b) (1) (A) of the Act by requiring Dowdall to procure a District Council temporary working card for a fee in order to register on the "Out-of-Work" list for purposes of qualifying for State unemployment compensation.

As we show below, the Board properly decided these questions in the affirmative.

B. By requiring Dowdall and Dockery to obtain temporary working permits for a fee, Local 1400 and the Los Angeles District Council violated Section 8 (b) (2) and (1) (A) of the Act

Settled law establishes that, subject to one sharply defined exception,¹² the rights of an employee or an applicant for employment may not be abridged or terminated because of his membership or nonmembership in a labor organization.¹³ Thus an employer violates Section 8 (a) (3) and (1) of the Act if he requires membership in a labor organization as a condition precedent to employment (see, e. g., *N. L. R. B. v. Swinerton & Walberg Co.*, 202 F. 2d 511, 514 (C. A. 9), certiorari denied, 346 U. S. 814; *N. L. R. B. v. Cantrall*, 201 F. 2d 853, 855-856 (C. A. 9), certiorari denied, 345 U. S. 996; *N. L. R. B. v. George D. Auchter Co.*, 209 F. 2d 273 (C. A. 5)), while a union violates Section 8 (b) (2) and (1) (A) of the Act if, either by agreement or by practice, it causes an employer to engage in such discrimination. See *N. L. R. B. v.*

¹² The proviso to Section 8 (a) (3) of the Act.

¹³ Before the Board, respondents contended that Section 8 (b) (2) of the Act, which prohibits unions from causing or attempting to cause employers from discriminating against *employees* in violation of Section 8 (a) (3) of the Act, relates only to employees and not to applicants for employment. This issue has long since been settled by the holding in *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 183-187, that the Act prohibited employer discrimination against applicants for employment, as well as against those already employed. Moreover, this Court has consistently enforced Board orders remedying union discriminations against applicants for employment. See, e. g., *N. L. R. B. v. Local 743*, 202 F. 2d 516; *N. L. R. B. v. Charles E. Daboll*, 216 F. 2d 143, certiorari denied, 348 U. S. 917.

International Union of Operating Engineers, Local 12, 237 F. 2d 670, 674 (C. A. 9), and cases there cited. Furthermore, “[a]n attempt to cause an employer to discriminate against an employee in violation of Section 8 (a) (3) constitutes a violation of Section 8 (b) (2) even though the employer did not as a matter of fact discriminate.” *Local 12, supra*, 237 F. 2d at 673.

Applying these settled principles to the facts of the instant case, Local 1400’s and the Los Angeles District Council’s discrimination against Dowdall and Dockery is manifest. Other employees, members of Local 1400, were referred to jobs without being required to pay a permit fee. By requiring Dowdall and Dockery to procure temporary working permits for a fee¹⁴ before they could even be considered for referral to jobs through Local 1400’s hiring hall, respondents effectively removed Dowdall and Dockery from the list of potential employees because of their nonmembership in an affiliate of the Los Angeles District Council. In thus requiring a fee only of nonmembers, respondents coerced them into assisting a labor organization in derogation of their Section 7 right to refrain from such assistance, thereby violating Section 8 (b) (1) (A). Moreover, since nonmembers were required to pay a special fee

¹⁴ O’Hare, an official of Local 1400, testified that the District Council kept the permit fees for “bookkeeping” purposes and that Local 1400 received no benefit from such fees (*supra*, p. 6). It is thus apparent that the permit fees cannot be considered as a “reasonable charge” for operating the Local’s dispatch system. *N. L. R. B. v. International Union of Operating Engineers, Local 12*, 237 F. 2d 670, 674 (C. A. 9).

to get a job, the requirement encouraged membership in a labor organization, and resulted in discriminatory conditions of employment violative of Section 8 (a) (3) and 8 (b) (2). *Local 12, supra*, 237 F. 2d at 673; *N. L. R. B. v. I. L. W. U.*, 210 F. 2d 581, 583 (C. A. 9); *N. L. R. B. v. Local 743*, 202 F. 2d 516 (C. A. 9).¹⁵

C. The policy of Local 1046 and the San Bernardino and Riverside District Council of not making the Local's registration and referral facilities equally available to members and nonmembers violated Section 8 (b) (2) and (1) (A) of the Act

What we have said above with respect to Local 1400 and the Los Angeles District Council is equally applicable to Local 1046 and the San Bernardino and Riverside District Council. These respondents likewise denied nonmembers access to the hiring hall unless they first obtained temporary work permits

¹⁵ At the hearing before the Trial Examiner respondents apparently sought to attack the good faith of Dowdall and Dockery by adducing testimony tending to show that they were familiar with the permit-fee requirements prior to their visits to the unions' halls (R. 150-151; 417, 418-419, 618-624). In *N. L. R. B. v. Swinerton and Walberg Co.*, 202 F. 2d 511, 515 (C. A. 9), certiorari denied, 346 U. S. 814, this Court rejected a similar contention, holding that "knowledge of a hiring policy which is discriminatory and illegal does not characterize an application for work as being made in bad faith where all the evidence indicates that the men would have accepted work if it had been tendered." Since the instant record firmly establishes not only that Dowdall and Dockery "would have" accepted employment, but, indeed, subsequently did accept jobs in their trade (R. 419-420, 591-592), it is clear that their good faith is not open to challenge. Moreover, the only relief which the Board's order affords Dowdall and Dockery is the recovery of the permit fees which they actually paid; the balance of the order is concerned with the respondents' unlawful hiring policy, the illegality of which is not affected by the good or bad faith of Dockery and Dowdall.

for a fee.¹⁶ That Local 1046 and its parent council followed this policy is evidenced not only by Dowdall's experience (*supra*, pp. 9-10), but also by the testimony of Adams and Jensen, officers of these respondents (R. 771, 831-832, 837-838), and by the "By-Laws and Trade Rules" of the District Council (*supra*, p. 7, n. 7). Accordingly, for the reasons outlined in Point B above with respect to Local 1400 and Los Angeles, the Board properly found that the other respondents likewise violated Section 8 (b) (2) and (1) (A) of the Act.¹⁷

¹⁶ Unlike *N. L. R. B. v. International Union of Operating Engineers, Local 12*, 237 F. 2d 670 (C. A. 9), the record here establishes that Local 1046 required the permit fees from foreign members, and it seems clear that such fees "were not a reasonable charge for operating the dispatch system." *Local 12, supra*, at p. 674. The fees are assessed pursuant to the District Council "By-Laws and Trade Rules" for District Council "Temporary Working Cards," and appear to have no relation to the operation of the Local's hiring hall. The fee for a 30-day permit was equivalent to one month's dues. Since the dues of union members were used not only for the expenses of the hiring lists but for all the other expenses of the union, it is evident that in charging the equivalent of a month's dues for a monthly permit the union would be charging foreign members more for the hiring hall than it charged its own members. Furthermore, in view of O'Hare's testimony that Local 1400 did not receive any of the permit fees paid to the Los Angeles District Council, it is unlikely that the practice in the Palm Springs area differed from that of Los Angeles, and it is a reasonable assumption that Adams signed the "Temporary Working Card" issued to Dowdall as a District Council representative rather than in his capacity as an officer of Local 1046.

¹⁷ Although the original complaint (R. 3-8) alleged this conduct to be violative only of Section 8 (b) (1) (A), during the course of the hearing the General Counsel amended the complaint to include an 8 (b) (2) allegation as well (R. 36-39). The Board sustained the Trial Examiner's conclusion that the conduct violated both Section 8 (b) (2) and (1) (A) of the Act, rejecting

D. By causing Dowdall, under pain of forfeiting his unemployment insurance, to pay a fee for a work permit, Local 1046 and the San Bernardino and Riverside District Council coerced him into contributing financial assistance to the Unions and penalized him because of his nonmembership, thereby violating Section 8 (b) (1) (A) of the Act.

When Clarence Dowdall sought unemployment compensation through the appropriate agency of the State of California, he was advised that he could not recover such compensation unless he was registered with a Carpenters' local as available for work. Accordingly, Dowdall sought to register with Local 1046, explaining to officials of that union and of its parent District Council that he would seek employment on his own, and desired to register only for the purpose of qualifying for unemployment compensation while he conducted his search for work. The union permitted him to register only after he paid a fee for a temporary working card, a fee not required of union members. The majority of the Board held that by exacting this fee the Union violated Section 8 (b) (1) (A) of the Act. We show below that this holding is correct.

Section 8 (b) (1) (A) provides that unions shall not restrain or coerce employees in the exercise of respondents' contention that Section 10 (b) barred the amendment to the complaint (R. 301). **In view of the fact that both** allegations are based on the identical conduct, it is too well settled to warrant extensive argument that the limitations proviso of Section 10 (b) did not preclude either the amendment to the complaint, or a Board finding based thereon. See *N. L. R. B. v. Osbrink*, 218 F. 2d 341 (C. A. 9) certiorari denied, 349 U. S. 928. See also *A. N. P. A. v. N. L. R. B.*, 193 F. 2d 782, 799-800 (C. A. 7), certiorari denied on this question, *I. T. U v N. L. R. B.*, 344 U. S. 816; *N. L. R. B. v. Syracuse Stamping Co.*, 208 F. 2d 77, 80 (C. A. 2); *N. L. R. B. v Pecheur Lozenge Co.*, 209 F. 2d 393, 402 (C. A. 2), certiorari denied, 347 U. S. 953; cf. *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, 34, n. 30.

their rights under Section 7, which includes the right to refrain from assisting a union. Manifestly when Dowdall paid money to the Union for a working card he was assisting it financially.¹⁸ The remaining questions are whether he was “restrained or coerced” into such assistance, and whether he was an employee protected by Section 7 and 8 (b) (1) (A) when he made the payment.

That respondents “restrained or coerced” Dowdall into paying the permit fee appears from the fact that they made it a condition to his obtaining unemployment compensation. This was manifestly economic coercion of a real sort. See *N. L. R. B. v. Philadelphia Iron Works*, 211 F. 2d 937, 944 (C. A. 3), where the court, with ample citation of supporting authority, shows that coercion in the statutory sense is not limited to force and violence but embraces economic compulsion.

We think it equally clear that Dowdall was an “employee” protected by Section 7 and 8 (b) (1) (A) from being coerced into assisting the Union. It is true that Dowdall was not at the time employed by any particular employer. Nevertheless, at least *vis-a-vis* the Union, Dowdall was embraced within the statutory concept of “employee”—*i. e.*, he was a member of the class seeking employment. See *Phelps-Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 191–192. Contrary to the suggestion in the dissenting opinion

¹⁸ See *N. L. R. B. v. Eclipse Lumber Co.*, 199 F. 2d 684, 686–687 (C. A. 9); *N. L. R. B. v. I. A. M., Local 504*, 203 F. 2d 173, 176–177 (C. A. 9); *N. L. R. B. v. Murphy's Motor Freight, Inc.*, 231 F. 2d 654 (C. A. 3), enforcing 113 N. L. R. B. 524.

(R. 311-313), nothing in the statute or in decisions construing it limits the impact of Section 8 (b) (1) (A) to threats "to deprive [employees] of a term or condition of employment." Indeed, such a construction would reduce Section 8 (b) (1) (A) to a mere corollary of Section 8 (b) (2), which deals with threats to the employment relationship.¹⁹

It should be noted, moreover, that Dowdall's claim for unemployment compensation arose directly out of his employee status and hence was in fact a term or condition of his prior employment. The statutory protection for employees extends to applicants for compensation due them as former employees just as it extends to applicants who are potential employees. Cf. *Phelps-Dodge, supra*, 313 U. S. at 191-192.

Furthermore, Local 1046 and the San Bernardino and Riverside District Council coerced Dowdall in the exercise of his right not to join Local 1046. Because of the Unions' policy of requiring nonmembers to procure District Council permits for a fee before they can register on the Local's "Out-of-Work" list, Dowdall was faced with the choice of transferring his membership to Local 1046 or submitting to the permit fee requirement in order to qualify for his unemploy-

¹⁹ In the cases relied on by the dissenting Board member (R. 312, n. 12), the economic coercion which the union was able lawfully to visit upon an employee was an incident to his loss of union membership. Under the proviso to Section 8 (b) (1) (A) a union can withhold membership from an employee who declines to assist it, and the economic coercion inherent in the Union's conduct is protected by the proviso. But when the Union denies, not *membership* but some other economic benefit, it has left the area protected by the proviso and has invaded the employee's right to refrain from assistance to a union.

ment insurance. He could refuse to accede only at the risk of forfeiting his unemployment insurance. Dowdall chose to pay the \$5.00 permit fee which, under these circumstances, was a tax in addition to his regular monthly dues as a member of the Alaska local, and, as the Board found, was "in effect a penalty for membership in a sister local of 1046 rather than in 1046" (R. 304). That this constituted coercion within the meaning of Section 8 (b) (1) (A) of the Act cannot be gainsaid.²⁰

III

The Board's order is valid and proper

To remedy the unfair labor practices, the Board ordered respondents, in the usual manner, to cease and desist from the discriminations found and to post the usual notices. In addition, the Board ordered respondents to refund the permit fees paid by Dowdall and Dockery. And, finally, the Board ordered the District Councils to publish appropriate notices in local newspapers of general circulation. We submit that these requirements are properly "adapted to the situation which calls for redress" and are reasonable

²⁰ The proviso to Section 8 (b) (1) (A) of the Act, stating that the proscriptions of that Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein," is inapplicable here for, as the Board states, "it is clear that the \$5.00 fee was exacted from Dowdall, not as a condition of acquiring or retaining membership in Local 1046, but merely as a condition of registering for unemployment compensation." (R. 304). See *N. L. R. B. v. Philadelphia Iron Works*, 211 F. 2d 937, 940-941 (C. A. 3); *N. L. R. B. v. George D. Auchter Co.*, 209 F. 2d 273, 276-277 (C. A. 5).

means of effectuating the policies of the Act. *N. L. R. B. v. Mackay Radio & Tel. Co.*, 304 U. S. 333, 348.

There can be no serious question as to the Board's power to direct a refund of the fees which Dowdall and Dockery were here required to pay the District Councils in order to make use of the Locals' hiring halls and obtain employment. See *N. L. R. B. v. Local 404, Int'l Brotherhood of Teamsters*, 205 F. 2d 99, 101-104 (C. A. 1).²¹ Here, as in *Local 404*, the direct consequence of respondents' violations of Section 8 (b) (2) of the Act was to leave Dowdall and Dockery with no alternative but to pay these sums, for unless they paid, they could not obtain listings on the "Out-of-Work" registers and could not work for an AGC or BCA member. Nor could they secure such permits without the monthly payments to the District Councils. Accordingly, as decisions of this Court and others make clear, since respondents' unfair labor practices have resulted in exacting such payments from employees as the price for their employment, an order "restoring * * * what would not have been taken from them if the [Act] had not [been] contravened" is both proper and necessary to "expunge the effects of the unfair labor practices" and "fully effectuate the policies of the Act." *Virginia Electric & Power Co. v. N. L. R. B.*, 319 U. S. 533, 541, 543-544.²²

²¹ As we have demonstrated *supra*, pp. 18, 20, n. 14, 15, these fees did not accrue to the locals as a reasonable charge for operating the dispatch systems. Cf. *N. L. R. B. v. Local 12 supra* at p. 674.

²² Settled law establishes that a reimbursement order constitutes reasonable exercise of the Board's broad power to remedy either union or employer unfair labor practices. See, with respect to

It is equally clear that, in the circumstances of this case, the mere posting of notices would be inadequate to bring home to all those who have been affected explicit assurance for the future that the respondents will refrain from their past unlawful practices of requiring permit fees from those employees who are not members of locals affiliated with one of the respondent District Councils. In all likelihood notices posted solely at the union halls would never be seen by nonmembers in the area who have been in the past either denied entry to the industry or subjected to the operation of the permit system. The Board by requiring, as it has elsewhere with judicial approval,²³ that the appropriate notice be published in a local newspaper of general circulation, which is likely to reach all employees in the area to whom the notice is addressed, has "suited" the remedy to the "practical needs" here evidenced (*N. L. R. B. v. Seven-Up Bottling Co.*, 344 U. S. 344, 351-352). This accords with the Board's long established policy of varying notice requirements so as to ensure

the union dues paid under an invalid union security agreement—*Local 404 supra*; dues paid an employer-supported or dominated union—*Virginia Electric & Power Co. v. N. L. R. B.*, *supra*, affirming 132 F. 2d 390, 396-398 (C. A. 4); *N. L. R. B. v. Spiewak*, 179 F. 2d 695, 697-698 (C. A. 3); *N. L. R. B. v. Baltimore Transit Co.*, 140 F. 2d 51, 57-58 (C. A. 4), certiorari denied 321 U. S. 795; *N. L. R. B. v. Parker Bros. & Co.*, 209 F. 2d 278, 279-280 (C. A. 5); excessive payments made to retain good standing in a union—*N. L. R. B. v. Eclipse Lumber Co., Inc.*, 199 F. 2d 684, 686-687 (C. A. 9).

²³ *N. L. R. B. v. Salant & Salant, Inc.*, 183 F. 2d 462 (C. A. 6), enforcing 66 N. L. R. B. 24, 114-116; *N. L. R. B. v. Local 420*, 39 L. R. R. M. 2173 (C. A. 3) December 11, 1956, enforcing 111 N. L. R. B. 1126, 1128.

in each case sufficient publication to “dissipate the unwholesome effect of violations of the Act” (*N. L. R. B. v. Frank Bros. Co., Inc.*, 321 U. S. 702 104). *N. L. R. B. v. Phillips Gas & Oil Co.*, 141 F. 2d 304, 306 (C. A. 3); *N. L. R. B. v. Sunbeam Electric Mfg. Co.*, 133 F. 2d 856, 861 (C. A. 7); *N. L. R. B. Sixteenth Annual Report* (Gov’t Print. Off., 1952), pp. 239, 240–245; *N. L. R. B. Twelfth Annual Report* (Gov’t Print. Off., 1948), p. 40.²⁴

²⁴ Where “the circumstances of the case are such” that posting of notices by employers or unions at their place of business alone would afford “insufficient notification to the employees” to effectuate the policies of the Act (*N. L. R. B. Eleventh Annual Report* (Gov’t Print. Off., 1947), p. 49), the Board, in addition to issuing orders identical with that here (see n. 23, *supra*), has required (1) mailing of notices to employees individually (*N. L. R. B. v. American Laundry Machinery Co.*, 152 F. 2d 400, 401 (C. A. 2); *N. L. R. B. v. Gibson County Electric Membership Corp.*, 177 F. 2d 203 (C. A. 6), enforcing 74 N. L. R. B. 1414, 1421; *Shartle Bros. Machine Co.*, 60 N. L. R. B. 533, 535–536); (2) publication in an official union newspaper of notices addressed to union members (*ANPA v. N. L. R. B.*, 193 F. 2d 782, 806 (C. A. 7), enforcing 86 N. L. R. B. 951, 963 and 86 N. L. R. B. 1041, 1049, certiorari denied as to this aspect, 344 U. S. 812); (3) publication of notices in the plant newspaper (*Tomlinson of High Point, Inc.*, 74 N. L. R. B. 681, 691; *Meier & Frank Co., Inc.*, 89 N. L. R. B. 1016, 1021); and (4) supplying of employer notices to a union for posting in places accessible to striking employees (*American Newspapers, Inc.*, 22 N. L. R. B. 899, 937).

CONCLUSION

For the foregoing reasons we respectfully submit that a decree should issue enforcing the Board's order in full.

KENNETH C. MCGUINNESS,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
FREDERICK U. REEL,
ABRAHAM SIEGEL,
Attorneys,
National Labor Relations Board.

JANUARY 1957.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

DEFINITIONS

* * * *

SEC. 2. When used in this Act—

* * * *

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. * * *

* * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * *

SEC. 10. * * *

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be

served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * *. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appro-

priate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

No. 15167

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LOCAL No. 1400, UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO; LOS ANGELES
COUNTY DISTRICT COUNCIL OF CARPENTERS, UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS OF AMER-
ICA, AFL-CIO; LOCAL No. 1046, UNITED BROTHER-
HOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-
CIO; and SAN BERNARDINO AND RIVERSIDE COUNTIES
DISTRICT COUNCIL OF CARPENTERS,

Respondents.

On Petition for Enforcement of an Order of the
National Labor Relations Board.

BRIEF FOR RESPONDENTS.

ARTHUR GARRETT,

2200 West Seventh Street,
Los Angeles 57, California,

Attorney for Respondents.

FILED

MAR 12 1957

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement of the case.....	2
“Commerce”	2
Unfair labor practices.....	6
Argument	9

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Newspaper Pub. Assn. v. N. L. R. B., 193 F. 2d 782	20
American President Lines, 101 NLRB 1417.....	18
Brotherhood of Carpenters (Wroan & Son), 106 NLRB No. 46	18
Carpenter & Skaer Co., 90 NLRB 417.....	12
Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197.....	13, 16
Eichleay Corp. v. N. L. R. B., 32 LRRM (.....).....	18
Hunken-Conkey Construction Co., 95 NLRB No. 56.....	18
Insulator Contractors Assoc., 110 NLRB 105.....	13
Jamestown Builders Exchange, 93 NLRB 386.....	13
Joliet Contractors Assn. v. N. L. R. B., 193 F. 2d 833.....	3
Loving & Evans v. Blick, 33 Cal. App. 2d 603.....	5
Mundet Cork Corp., 96 NLRB 175.....	18
National Labor Relations Board v. Amalgamated Local 286, 222 F. 2d 95.....	20
National Labor Relations Board v. Haddock Engineers, Ltd., 215 F. 2d 734, 34 LRRM 2789.....	13, 16
National Labor Relations Board v. Meat Cutters Union, 31 LRRM 1553	18
National Labor Relations Board v. Swinnerton, 31 LRRM 2384	18
United Mine Workers, 100 NLRB No. 64.....	18
Webb Construction Company v. N. L. R. B., 30 LRRM 2108....	18

STATUTES

National Labor Relations Act, Sec. 2(3).....	13
National Labor Relations Act, Sec. 8(b)(1).....	20
National Labor Relations Act, Sec. 8(b)(1)(A)	2, 6
National Labor Relations Act, Sec. 8(b)(2)	6, 13
National Labor Relations Act, Sec. 8(2).....	2

No. 15167

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LOCAL No. 1400, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; LOCAL No. 1046, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and SAN BERNARDINO AND RIVERSIDE COUNTIES DISTRICT COUNCIL OF CARPENTERS,

Respondents.

On Petition for Enforcement of an Order of the
National Labor Relations Board.

BRIEF FOR RESPONDENTS.

Jurisdiction.

In the record of this case will be found the Order of the National Labor Relations Board together with the Opinion of Member Oliver H. Peterson, dissenting in part [R. 297-317], which we think sets forth the applicable law and the correct view of the evidence in the Palm Springs case.

The alleged unfair labor practices in the case numbered 22-CB-548, hereinafter called the Santa Monica case, occurred in the Santa Monica-Pacific Palisades area of Los

Angeles County, and the alleged unfair labor practices in case No. 21-CB-600, hereinafter called the Palm Springs case, occurred in the Palm Springs area of Riverside County.

Statement of the Case.

"Commerce."

The Board found that by the alleged unfair labor practices, Respondent violated Section 8(b)(1)(A) and (2) of the Act, which violations affected "commerce" within the meaning of the Act. The reasons for these findings as to "commerce" are by no means as clear as Petitioner would have us believe.

The rationale of these findings in the Santa Monica case is unclear, and in the Palm Springs case entirely obscure.

In the Santa Monica case the Intermediate Report speaks of a "web" or "complex" of "enterprises," which words are probably intended to denote, in plain language, that members of the Pardee family and others, have various interests in certain partnerships and corporations operating in California and Nevada, and seems to assert further that commerce jurisdiction is satisfied by reason of various services rendered by these partnerships and corporations to each other. [R. 51-57.] The legal basis for this conclusion is not apparent and the order of the Board, while adopting the Intermediate Report in part [R. 298], fails to advise us upon what theory the Board considered that commerce jurisdiction had been established. The other basis upon which the Intermediate Report attempts to meet the requirements of commerce jurisdiction is upon presumed evidence of the membership of the employer in the Building Contractors Association, some members of which are alleged to be engaged in

businesses and in serving businesses affecting commerce. The trouble with this contention is that in the Pardee “web” or “complex” there are various enterprises of the same or similar names, and there is no evidence that the employer involved in the Santa Monica case was a member of any kind in B.C.A. Furthermore, the record affirmatively shows that the B.C.A. has two groups of membership, one group being members who are represented in labor relations matters by the Association and one group who are not. The record shows that but one of the enterprises in the whole Pardee “web” or “complex” was in this B.C.A. group for which the Association handled labor relations, and entitled to sign its contracts, while all of the other enterprises were not, and may have been, as far as this record is concerned, operating on an open shop and absolutely non-union basis. There is no evidence that employment of the charging parties, Dowdall and Dockery, was contemplated by Pardee Construction Company, the single enterprise which was in the labor relations group, an enterprise in course of dissolution, and not by an active enterprise known as Pardee Construction Company No. 2.

Petitioner’s Brief, page 14, attempts to lead us to a tacit acceptance that commerce jurisdiction in the Santa Monica case is satisfied and established under the doctrine of *Joliet Contractors Assn. v. N. L. R. B.*, 193 F. 2d 833, by membership of “Pardee” in the B.C.A., the assumption being that all members of the B.C.A. are represented in labor relations by the Association and are bound by its contracts. Petitioner’s Brief, page 4, even goes so far as to say “All members of A.G.C. and B.C.A. were considered signatory to these contracts * * *.”

This is not true. There are two classes of membership in B.C.A. The employer or prospective employer of the

charging parties is neither a member of B.C.A. nor a party to its contract with Respondents, assuming there is any such contract.

The testimony of Edward M. Sills, Executive Vice-President of Building Contractors Association of California, Inc., referred to in this Brief as Building Contractors Association, or as B.C.A., is in the record [R. 666], as follows:

“(Testimony of Edward M. Sills.)

Cross-Examination * * *

Q. (By Mr. Garrett): Now, is it a part of the service—Pardee is a paid up member, I take it, of the Building Contractors Association? A. Yes, he is, they are. [1395]

Q. You say ‘he is’ or ‘they are’? A. They are.

Q. Who is and who are? A. Pardee Construction Company.

Q. Pardee Construction Company, right? A. Yes.

Q. And not Pardee-Phillips and not Pardee Construction Company No. 2? A. No.

Q. And as paid up members of yours, they are entitled to all your services, are they not? A. Yes, sir.

Q. And they are entitled to your services in labor relations? A. Yes.

Q. They are one of your members who you regard as being in that group that you handle labor relations for, correct? A. That’s right. [1396]

* * *

The Pardee Construction Company referred to by Mr. Sills had been in process of dissolution since 1952 which was the last year it engaged in building construction under license as required by the State of California [R. 103] and beginning with the 1953-1954 fiscal year the license

was held by Pardee Construction Company No. 2, also a partnership. The presumption is that Pardee Construction Co. was not violating the law by operating as a general contractor. (*Loving & Evans v. Blick*, 33 Cal. App. 2d 603.)

B.C.A. members of the eligible group, *i.e.*, that class of members represented for labor negotiations and contracts by the Association, had prior to 1946 signed the agreements, but since that date had become "signatory" by sending a post card to the Association. [R. 528.] The only possible employer of the charging parties purporting to be signatory to a B.C.A. contract or represented by B.C.A. at any time material in this case is Pardee Construction Company. [R. 532.] The signature is by the post card method described above and is for the years 1948 and 1949. [R. 550, 553, 554.]

As to the Palm Springs case, there is nothing said either in the Intermediate Report or in the Board's Order which shows a basis for commerce jurisdiction at all; the facts simply being that there was no employment ever contemplated and no employer ever contemplated. Discussions in the Intermediate Report about labor contracts between various employers and employers' associations and the Respondents are therefore simply irrelevant.

With respect to facts which connect any of the alleged acts of Respondents in this case to the flow of interstate commerce, or of having any effect upon such commerce, the matter is quite simple. There were none. There was no evidence that any employer, named or unnamed, was connected with any of the alleged acts of Respondents. The Board has simply swallowed the incredible Findings of its Trial Examiner. [R. 72.] There was no evidence that any employer, unnamed or named, for which Mr. Dowdall worked, while within the jurisdiction of these

Respondents, imported or exported any materials or other things across state lines, or that any materials used by any of them, if they used any, were obtained either directly from out of the State of California or through any intermediary. Neither was it shown that any employer involved in this case was a member of either the Associated General Contractors or Building Contractors Association, which are purported to be associations of contractor employers having contracts with Respondents.

Unfair Labor Practices.

In the Santa Monica case, the charging parties pretended to be carpenters looking for employment, but they were actually sea-lawyers looking for a lawsuit. They came to California fresh from a recovery of damages against the Anchorage, Alaska, local of the Carpenters and immediately set about laying the foundation for a similar action here.

The Carpenters local unions in Los Angeles County provided a referral service. None of their contracts provided that individuals so referred for employment be union members, either of the local unions or of the parent organization. This service was available for a few dollars, actually three dollars. The services of a private intelligence agency, or employment agency as they are commonly called, would have cost from one-third to one-half of the first month's wages, or about fifty times as much, although this is not in the record. Approaching this situation, Dowdall and Dockery, instead of handing in their dues books, which they had with them, chose to pay the three dollars. It is upon the basis of their exercise of this alternative that the Board has found violation of Section 8(b)(2) and of Section 8(b)(1)(A) of the Act.

In the Palm Springs case Mr. Dowdall, the charging party, was contemplating no employment, but only the collection of what is termed unemployment insurance indemnity. There is no showing that his application to the union was made for any other purpose than that of saving him from the trouble of having to go and look for a job, a search for employment being a condition for receiving the unemployment insurance payments. There was no connection between his application to the union and any employment, which he did not want, nor with any employer. He had absolutely no intention of working for a union employer under referral by the union and he tells this in his own words [R. 655]:

“(Testimony of Clarence A. Dowdall.)

Q. (By Trial Examiner): Do I understand from your testimony, then, that at the time that this document, General Counsel’s 30, was given to you by Mr. Adams at or about the same time you did sign the sort of list you indicated? [1292] A. Yes, I signed that list, yes, sir.

Q. Did Mr. Adams or anyone else explain the significance of the signing of the list and what would happen as a result of your having signed it? A. Yes, Mr. Adams told me after I signed the list that, ‘Now,’ he says, ‘you can go back to Indio and give this Employment Bureau man down there this number 61 and then,’ he says, ‘he will make you eligible at the office to sign up for the unemployment insurance.’

Q. Did he make any other statements by way of explanation as to the significance of your signature on that list? A. He said the, my signature on this list does not entitled you to go to work here. He says, ‘You understand that?’

And I says, 'I'm not signing my name on this list with the intentions of asking you for a job, see, or intention of going to work because,' I said, 'I always went out and found my own job.' [1293.]"

[R. 842]:

"(Testimony of James Adams.)

Recross-Examination

Q. (By Mr. Heimann): Mr. Adams, on January 7 when Mr. Dowdall, when you put Mr. Dowdall's name on the list on the [1827] out-of-work list— A. Yes.

Q. —did you say to him that that did not entitle him to go to work? A. No, that is merely for record for out of work.

Q. I know, you so testified. My question is, didn't you tell them that the fact that his name was on the list did not entitle him to go to work? A. No, I didn't tell him that because I couldn't put him to work anyway because 50 men were out of work, I had no jobs.

Q. Yes. Didn't you say to him that that was for unemployment only, for the unemployment compensation only but that that didn't give him the right to go to work? A. I merely stated there that by placing the name on that list he would go out in rotation with the rest of the men and, also, for the unemployment office, his name and number.

Q. And did you tell him that until his name came up he could not— A. He said he didn't want to work.

Q. He said he didn't want to work? A. He said he merely wanted his name on there on draw unemployment insurance.

Q. Did he say he didn't want to work or didn't ask you to send him to work? A. That's right. [1828.]"

ARGUMENT.

The only construction project involved in this proceeding is the one at Pacific Palisades, near Santa Monica. Suspicion rather than credible evidence, exists that it was operated, at the critical period in the case, December, 1953, by Pardee Construction Company, as general contractor, which partnership had no contractor's license in that year.

Neither that partnership, nor any of the other enterprises considered as being in the "web" or "complex" by the Intermediate Report shows in this record (1) as shipping or receiving anything across state lines, (2) as receiving anything for the Pacific Palisades building project across state lines.

If Pardee Construction Company was operating the construction project involved in this case, that was its last and only operation.

The burden of proving assertable jurisdiction is, of course, always on the General Counsel. In this matter he has sought to bring his proof, in the Santa Monica case, within two theories, (1) that Pardee Construction Company is engaged directly in a business effecting commerce, or (2) that Pardee Construction Company is a member of an employer's association which in the composite, is engaged in a business having an effect upon commerce. In the Palm Springs case he relies on only the theory that the composite of employers, taken in the aggregate, have sufficient impact upon the flow of commerce so that the aggregate activities affect the commerce flow.

Without going into a detailed recitation of the voluminous testimony submitted by the General Counsel, most if not all of which is hearsay uncorroborated, it is suffi-

cient to observe that at no place in the record is there any evidence that Pardee Construction Company, the only named employer in the entire case, shipped anything across state lines in any amount. While there is some hearsay evidence with respect to the value of materials used by that company on the building project involved in these proceedings, there is not a scintilla of evidence as to the source of the origination of such materials. This lack of probative evidence upon a point so vital, taken in connection with the consideration that the projects into which these materials were processed were residences, purely local in character, having not the faintest relation to interstate commerce, patently demonstrates that Pardee Construction Company was not engaged in a business affecting commerce and could not, under any consideration or decision of the Board, be brought within the rules of assertable jurisdiction now followed by the Board. To buttress this obvious deficiency, General Counsel burdens the record with uncorroborated testimony concerning certain business connections which some of the individual partners of Pardee Construction Company have in building projects in Las Vegas, Nevada. Here, again, the General Counsel has failed to meet his burden of proof. It is clear that the Nevada operations, stand alone, and no testimony in the record in that respect meets any of the jurisdictional proof requirements of the Board, for like the Pardee Construction Company operations, the materials processed into the Nevada activities are unaccounted for as to source of origination or any connection with commerce, directly or indirectly. Another thing is abundantly apparent, and that is the lack of any proof designed to show the interchange or flow of any materials between the Nevada operations and those of Pardee Construction Company in California. PARDEE

CONSTRUCTION COMPANY HAD NO OPERATIONS AND CONDUCTED NO BUSINESS OUTSIDE OF THE STATE OF CALIFORNIA.

The only connection, if it can legally be called a connection, between Pardee Construction Company and the Nevada operations is through the fact that certain partners of Pardee Construction Company were stockholders in companies conducting the Nevada operations. We submit this is not enough. To hold to the contrary would be tantamount to holding that any person living in California owning a substantial amount of stock in a company operating outside of the state was, *per se*, engaged in a business affecting commerce. The Act permits of no absurd results.

Addressing ourselves next to the consideration of General Counsel's "aggregate" theory, we urge failure of proof.

In furtherance of this theory, General Counsel produced witnesses whose hearsay testimony was to the effect that they were members of an employer's association called Associated General Contractors (herein called A.G.C.), and had engaged in building a military project at Twenty-nine Palms, California. However, no attempt was made to show *that any employer* involved in any phase of these proceedings were members of the A.G.C. This type of testimony does not support the aggregate theory in either of the cases, and especially in the Santa Monica case, because there is no showing that Pardee Construction Company is, or ever had been, a member of A.G.C. Further, this testimony does not aid the General Counsel in the Palm Springs case, as there is no evidence that the military project was, in any wise, connected with Local 1046, or for that matter that the project was con-

ducted under any union contracts with any unions. As we have previously pointed out, in the respect of this latter case, there was no proof that any employer for whom the charging party worked was a member of A.G.C. or any other employer association. We submit that as to the Palm Springs case there is no proof of any nature to bring that case under any conceivable assertable jurisdictional standards of the Board.

There was an attempt on the part of the General Counsel to prove that Pardee Construction Company was a member of Building Contractors Association (herein called B.C.A.) and, thus, to bring the Santa Monica case within assertable jurisdiction under the "aggregate" theory. It is not our purpose to belabor the unconvincing quality of the evidence designed to show that Pardee Construction Company was a member of B.C.A. We urge that, at best, the evidence creates only a suspicion of membership. Assuming, for the purpose of this brief, that the evidence in this respect is sufficient, the proof does not meet the aggregate theory requirements. The testimony, in this connection, was produced through witnesses testifying that Oltman Construction Company, had done "construction" work for Firestone Rubber Company, B. F. Goodrich Company, and some aircraft manufacturing plants, all within the State of California. No testimony was advanced to show that any of this construction went into any product which later found its way into interstate commerce. The record is completely silent as to the use any of these constructions were put by any of the recipients. *There was no affirmative proof of any connection with commerce.*

In *Carpenter & Skaer Co.*, 90 NLRB 417, at 419, the Board set forth the tests as would apply when asked

to assert jurisdiction under the aggregate theory. There the evidence showed that 90% of all industrial and commercial construction in the county in which the case arose was performed by members of an association in volume amounting to 20 million dollars, of which \$2,000,000.00 represented purchase from outside the state. None of these evidentiary requirements are met in the instant matter. (See also *Jamestown Builders Exchange*, 93 NLRB 386, and *Insulator Contractors Assoc.*, 110 NLRB 105.) Then too, the hearsay character of the evidence produced on this phase is completely uncorroborated and does not amount to substantial evidence sufficient to sustain a finding of assertable jurisdiction. (*N. L. R. B. v. Haddock Engineers, Ltd.* (C. A. 9), 215 F. 2d 734, 34 LRRM 2789; *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197.)

The complaint in this case charges that respondents refused to issue “clearances” to Dowdall and Dockery. It is to be noted that there was no allegation that such a refusal, if it did occur, caused or attempted to cause “an employer to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of *acquiring or retaining membership.*” (Sec. 8(b)(2), N. L. R. A., as amended; emphasis supplied.)

There is no room for concluding, on this record, that either Dowdall or Dockery was an “employee” within the statutory definition of “employee.” (Sec. 2(3).)

Likewise, the evidence does not admit to the finding that any of these respondents has any contact with Pardee Construction Company which caused Pardee Construction

Company to refuse to give jobs to either of these two men. There is a complete absence of anything flowing between the company and these respondents other than the fact, if it be a fact, that each are parties to a collective bargaining contract which the General Counsel admits is not improper or illegal.

The contract itself is unfairly presented in the Board's brief, pages 4 and 5, as to its hiring provisions, by the omission of Article II-A, to which these provisions are subject, and which reads as follows [R. 498-450]:

“II.

Union Recognition

A. That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective bargaining representatives of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such jurisdiction is defined by the Building and Construction Trades Department of the American Federation of Labor as of the date of this Agreement. It is understood that the Unions do not at this time, nor will they during the term of this Agreement, claim jurisdiction over the following classes of employees: executive, civil engineers, and their helpers, superintendents, assistant superintendents, master mechanics, time keepers, messenger boys, office workers or any employees of the Contractor above the rank of craft foreman.

That subject to this understanding the Contractor shall have entire freedom of selectivity in hiring and may discharge any employee for any cause which he may deem sufficient, provided there shall be no discrimination on the part of the Contractor against any employee, nor shall any such employee be discharged

by reason of any Union activity not interfering with the proper performance of this work.

It is the intention of the parties that all workmen covered hereby shall be or become forthwith upon employment and remain continuously, members in good standing of the International Unions signatory hereto through their affiliated Local Unions having work and area jurisdiction and on whose behalf this Agreement is executed, as a condition of employment, and that this provision shall become operative without further notice or amendment whenever amendments to or judicial interpretations of the Labor Management Relations Act of 1947 remove the inhibitions against the application of this paragraph now existing under the present wording and judicial interpretations of that Act.

It is agreed that all workmen covered hereby shall be or become, not more than thirty (30) days after employment and remain continuously, members in good standing of the International Unions signatory hereto through their affiliated Local Unions having work and area jurisdiction and on whose behalf this Agreement is executed, and shall remain available for work as a condition of employment.”

Did either Dowdall or Dockery ever visit the Pardee Construction job site or talk to a representative of that company about employment of any kind or character at any time within the period covered by the complaint? They each said that they did. They offered no evidence of any person connected with Pardee Construction Company to corroborate their statements. Admittedly, none of Respondents or their representatives were present at any conversation between Pardee Construction Company and these two men. Such evidence is of the clearest hear-

say. Without corroboration that evidence is of no probative value whatsoever. (*N. L. R. B. v. Haddock Engineers, Ltd., supra*; *Consolidated Edison Co. v. N. L. R. B., supra*.)

These men presented to Savage, an employee of Local 1400, pieces of paper bearing no identifying printing or markings purportedly signed by a foreman of Pardee Construction Company. No evidence was adduced as to the genuineness of the signature. Whether the foreman signed those pieces of paper or not is undisclosed by this record. For all that appears in the records, those pieces of paper could have been signed by anyone. They, too, are of the clearest hearsay, and are entitled to no weight.

What occurred in this case, the practice that was followed, was a production of the Board's Regional Director and his legal adviser. Both witness Boyce and witness O'Hare were graphic in the participation of the Regional Director and his lawyer in not only the drafting of the instrument, but also in its practical explanation made by the Director and his lawyer at a meeting of Respondents' representatives and other unions held for that purpose. May the Trial Examiner or the Board now penalize any person which followed the context of that instrument when the Regional Director went to such pains to draft and explain it. Are persons to be found guilty when they follow the dictates of the party charged with a proper enforcement of the law? The Board has held that under such circumstances no finding of guilt is justified.

There is nothing improper or illegal in the way Respondents' agents handled this matter. First, they are presented with an unauthenticated piece of paper which they are asked to treat as an instruction to clear these men for work. Secondly, these men, members of the Carpenters union and subject to its usages and customs,

were acquainted with the procedural requirements incumbent upon them in their exercise of the privileges of union members. They knew, in advance, that Local 1400 had a work list, because Dockery had worked under that local and had attended its meetings, and had been present at its hall on numerous occasions. These men also, prior to going on the job, if they did, had discussed these various phases with a trustee of Local 1400, and had been told what was necessary for them to do. They are not in a position to plead ignorance of custom and, in fact, their very words show their acquaintance with the practice and custom. Dockery and Dowdall, when they first went to Savage, showed their books *"and asked for a work permit."* Each of them knew that it was not necessary for them to obtain a work permit. They knew they could deposit their dues books and be under the privileges of the local without doing another act, and most certainly they knew the deposit would not entail the outlay of money, whereas the obtaining of a work permit did. Each of them referred to the money paid out for permits as traveling dues. Each knew they were dues currently required by the union. Each of them well knew that if they were to receive the privileges and protections of the Local they must comply with the clear duty to pay their traveling dues or else deposit their books. The choice was theirs. They preferred to pay their traveling dues rather than deposit their books.

It must also be noted the absence of any evidence that *the union conditioned the employment of these men upon membership or non-membership in a union.* The condition, if it was imposed, was, by only their testimony, imposed by the foreman of Pardee Construction Company and not by any representative of Respondents.

These men were seeking to avail themselves of a hiring service maintained by the union. They willfully submitted themselves to the universal requirements of their union. After their compliance with the rules they had no further difficulty obtaining the hiring services and, through those services, jobs.

Hiring arrangements, such as Local 1400 and Local 1046 maintain, are not *per se* illegal or improper (*Eichleay Corp. v. N. L. R. B.* (C. A. 3), 32 LRRM; *N. L. R. B. v. Swinnerton* (C. A. 9), 31 LRRM 2384; *Webb Construction Company v. N. L. R. B.* (C. A. 8), 30 LRRM 2108). The Board held in *Hunken-Conkey Construction Co.*, 95 NLRB No. 56, that a hiring hall arrangement between an employer and a union was not illegal even though the employer agreed to hire only through the union, and when the contract makes the union the sole source of labor supply by “referral” for employment, no violation of the Act occurs (*American President Lines*, 101 NLRB 1417) and the Board held that a union and employer did not violate the Act by alleged refusal to grant working cards where it was not proved that (1) the employer was a party to an illegal contract, (2) that a discriminatory hiring arrangement existed, and (3) the union and its business agent had not demanded or requested the employer not to hire applicants. (*Brotherhood of Carpenters (Wroan & Son)*, 106 NLRB No. 46.) To the same effect are *Mundet Cork Corp.*, 96 NLRB 175; *United Mine Workers*, 100 NLRB No. 64; *N. L. R. B. v. Meat Cutters Union*, 31 LRRM 1553, this latter case going so far as to hold that no illegality obtains unless the employer “must have been told” of the union’s opposition to the proposed employment.

When Dowdall went to Palm Springs he had one thing in mind. He wished to obtain unemployment compensa-

tion through a registry in the states rather than through the registry in Alaska. His first act was to visit the Indio office of the unemployment compensation board to make such an application but, upon inquiry, learned that he must be certified as out of work before he could become eligible for compensation. It was explained to him that if he was a member of a union and out of work the union could function as the certifying agent. Dowdall then went to Local 1046, where he requested permission to sign that Local's out-of-work list, in order to complete his application for unemployment compensation. He stated he did not wish to be on the list for the purpose of obtaining a job but that a number from the work list would complete his application to the State for compensation. This view of the evidence is the only one that will accord itself to all the available facts. While there was a conflict of evidence as to whether Dowdall made any request for a job, the undisputed evidence points the other way. In fact, he had a job when he made the application. It is, however, quite clear that he did not seek a clearance from this Local, nor was one necessary to obtain or maintain employment. His own evidence that he got his own *jobs* and worked on them without interference negatives any conclusion that a clearance was necessary or that one had been refused him.

The General Counsel advances the idea that Dowdall was "exacted" of permit fees, but the fee that he was required to pay, at least on January 7th, was not for the purpose of obtaining employment, but for the purpose of qualifying for unemployment compensation and, by no stretch of the imagination, can that he termed an unfair labor practice. There appears from this evidence not the slightest indication that Dowdall was restrained from anything or coerced in any manner. Manifestly, there is in-

sufficient probative evidence to sustain a finding that Section 8(b)(1) was violated, and it is totally absurd to even consider, on this evidence, a finding that the union caused or attempted to cause any employer to discriminate against Dowdall or any other employees.

It will be noted that Dowdall was apparently working for Cornelius and Lampman at the time of the alleged unfair labor practice and at the time of filing the charge, 21 CB 600, but nowhere in the record is there any mention of this employer. [R. 1, 2.] We do not know whether the employer is or is not a member of an association, a party to a labor contract, union or non-union.

In the Santa Monica case Dowdall, actually the charging party and Dockery, who has been referred to above as a charging party at times, were dispatched to work and in the Palm Springs case no work was desired. There was no violation of any of the rights guaranteed by Section 7 of the Act.

N. L. R. B. v. Amalgamated Local 286, 222 F. 2d 95, 98;

American Newspaper Pub. Assn. v. N. L. R. B., 193 F. 2d 782, 800.

Respectfully submitted,

ARTHUR GARRETT,

Attorney for Respondents.

No. 15,170

United States Court of Appeals
For the Ninth Circuit

GRACE LOWE,

Appellant,

VS.

GLENN A. WILLACY,

Appellee.

Appeal from the District Court for the
District of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

WILLIAM V. BOGGESS,

213 Nerland Building, Fairbanks, Alaska,

Attorney for Appellee.

FILED

OCT 4 1956

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Statement of jurisdiction	1
Statement of the case	2
Argument of case	5
I. Specification that court erred in dismissing appellant's "motion to reargue"	5
II. Specification that court erred in dismissing appellant's complaint	6
Conclusion	12

Table of Authorities Cited

Cases	Pages
Bradley v. Fischer, 13 U.S. (Wallace) 335	8
Daniels v. Goldberg, U.S.D.C. New York 8 F.R.D. 580, affirmed 173 F. (2d) 911	6
Jordon v. Federal Farm Mortgage Corp., C.C.A. Iowa 1945, 152 F. (2d) 642, certiorari denied 66 S. Ct. 1339, 328 U.S. 821, 90 L. Ed. 1601, certiorari dismissed 66 S. Ct. 1340, 328 U.S. 852, 90 L. Ed. 1624	6

Rules	
Federal Rules of Civil Procedure, Rules 60(a) and 73	6

Statutes	
Act of Congress of June 6, 1900, c. 786, sec. 12 (48 FCA 105)	2
Act of Congress of June 6, 1900, c. 786, sec. 6 (48 FCA 108)	2
ACLA 1949, Section 61-4-1	3, 7
ACLA 1949, Section 61-6-2	3, 7
28 USCA, Section 1291	2

Texts	
30 Am. Jur. (Judges), Sections 43 and 44, pages 756, 757 ..	12

No. 15,170

United States Court of Appeals For the Ninth Circuit

GRACE LOWE,

Appellant,

vs.

GLENN A. WILLACY,

Appellee.

Appeal from the District Court for the
District of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

This is an appeal from an order of the District Court for the District of Alaska, Fourth Division, dismissing appellant's Amended Complaint in an action brought by appellant to recover damages from appellee as surety on the statutory bond of Nedra Bor-ing, United States Commissioner, Fairbanks Precinct, Fourth Division, Territory of Alaska; and from order of said District Court refusing to review its order of dismissal and dismissing appellant's "Motion To Re-argue" after an appeal had been taken by appellant from said order of dismissal.

Appellant relies on Title 28, USCA, Section 1291, for the jurisdiction of this Court to review the rulings set out above.

STATEMENT OF THE CASE.

The appellee, Glenn Willacy, defendant below, was a surety on the statutory bond of Nedra Boring, United States Commissioner and ex-officio Probate Judge for the Fairbanks Precinct, Fourth Division, Territory of Alaska (T.R. 2). The condition of the bond was that the said Nedra Boring "shall faithfully perform the duties of United States Commissioner" and said bond was furnished pursuant to the Act of Congress of June 6, 1900, c. 786, sec. 12 (48 FCA 105) "in the penalty of \$1,000.00. . ."

Among the duties thus bonded are those of probate judge and justice of the peace, statutory incidents of the office of a Commissioner in Alaska. (Act of Congress of June 6, 1900, c. 786, sec. 6 (48 FCA 108).

In exercising the function of a probate judge, Commissioner Boring allegedly ordered the appellant Lowe to appear in the Probate Court in connection with an estate proceeding (Amended Complaint, paragraphs I and II, T.R. 4). The nature of the proceeding and of the Commissioner's order and citation to appellee Lowe does not appear on the face of the Amended Complaint or anywhere else in the Transcript of Record. It may be garnered from Miss Lowe's brief (pages not numbered on copy of brief served on appellee) that a decedent's estate was in-

volved and that appellant was cited to appear pursuant to the provisions of ACLA 1949, section 61-6-2.

That section is quoted in full as follows:

“Property concealed or wrongfully disposed of: Citation. Whenever it appears probable from the affidavit of an executor or administrator, or of an heir or other person interested in the estate, that any person has concealed or in any way secreted or disposed of any property of the estate, or any writing relating or pertaining thereto, or that such person has knowledge of any such property or writing being so concealed, secreted, or disposed of, and refuses to disclose the same to the executor or administrator, the commissioner, upon the application of such executor or administrator, may cite such person to appear and answer under oath concerning the matter charged (CLA 1913, Sec. 1642; CLA 1933, Sec. 4401.)”

Appellant Lowe sought to recover damages against the appellee Willacy as surety on Commissioner Bor-ing’s bond based upon an allegation that the citation was void because the administrator of the decedent’s estate had not filed an administrator’s bond as required by ACLA 1949, section 61-4-1 (Amended Complaint, paragraph II, T.R. 4).

That section of the Alaska Code reads in full as follows:

“When required: Exception: Executor’s liability. No executor or administrator is authorized to act as such until he shall file with the commissioner having jurisdiction of the estate an undertaking in a sum not less than equal the prob-

able value of the estate, with one or more sufficient sureties, to be approved by the commissioner, to be void upon condition that such executor or administrator shall faithfully perform the duties of his trust according to law; provided, when by the terms of his will a testator shall expressly declare that no bonds shall be required of his executor, such executor may act upon taking an oath to faithfully fulfill the trust without filing the undertaking in this section mentioned; provided further, such executor shall be criminally and civilly liable as other executors and administrators are for any dereliction of duty. (CLA 1913, Sec. 1609; CLA 1933, Sec. 4365; am L 1943, ch 4, Sec. 1, p. 45.)”

Issue was joined upon appellee’s answer denying the allegations of the Amended Complaint and affirmatively alleging its failure to state a claim (T.R. 6).

At pre-trial conference, the Court below dismissed the complaint. The copy of the typewritten transcript of record served upon appellee contains neither the date of the order nor its content (T.R. 6). However, it is appellee’s recollection that the Court below held that the Commissioner Boring had not acted without jurisdiction and therefore was not liable to appellant. Appellee’s liability as surety could, of course, be no greater.

On April 23, 1956, appellant filed Notice of Appeal in the Court below from the Order of Dismissal at pre-trial (T.R. 19). On the same day appellant filed a motion denominated “Motion to Re Argue (sic) and

Brief in Support” in which she requested the Court below to “rehear and consider Amended Complaint submitted with supporting brief” (T.R. 7).

This motion was dismissed for lack of jurisdiction by the Court below. The date or content of the Order to Dismiss does not appear in the typewritten copy of the transcript of record served upon appellee (T.R. 17).

A second Notice of Appeal was filed in the Court below on the 7th of May, 1956, from both the order dismissing the complaint and from the order dismissing appellant’s Motion to Reargue (T.R. 17).

Appellant specifies as error the two rulings of the Court below set out above (Statement of Points, T.R. 18 and Appellant’s Statement of Case appearing on the third page of her brief).

ARGUMENT OF CASE.

I. SPECIFICATION THAT COURT ERRED IN DISMISSING APPELLANT’S “MOTION TO REARGUE”.

We will consider first appellant’s specification that the Court below erred in dismissing appellant’s “Motion to Re Argue (sic) and Brief in Support” for lack of jurisdiction.

As previously indicated this motion was filed after appellant had already filed a Notice of Appeal from the prior order of that Court dismissing her complaint.

The perfection of an appeal, of course, divested the Court below of any further jurisdiction in the cause except that specifically saved to it under Rules 60(a) and 73 of the Federal Rules of Civil Procedure. (*Jordon v. Federal Farm Mortgage Corp.*, CCA Iowa 1945, 152 F. (2d) 642, certiorari denied 66 S. Ct. 1339, 328 U.S. 821, 90 L. Ed. 1601, certiorari dismissed 66 S. Ct. 1340, 328 U.S. 852, 90 L. Ed. 1624. *Daniels v. Goldberg*, USDC New York 8 F.R.D. 580, affirmed 173 F. (2d) 911. Thus under Rule 60(a) clerical mistakes or omissions in the record may be corrected during the pendency of an appeal before the appeal is actually docketed in the Appellate Court, and under Rule 73 the time for docketing an appeal may be extended by the lower Court and the appeal may also be dismissed prior to its being docketed upon stipulation of the parties or upon motion and notice. Appellant in the instant case did not elect to dismiss her appeal, and no provision is made in the Rules for a court to review an order which it makes from which an appeal has been taken.

Under the clear intent of Rule 73, an appeal is deemed perfected upon filing of the required notice. *Daniels v. Goldberg*, supra.

II. SPECIFICATION THAT COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT.

Appellant also specifies as error the order of the Court below dismissing her amended complaint. Assuming even that appellant could prove every material

allegation of her complaint as supplemented by her brief on file in this Court, there was no error.

It is to be noted that ACLA 1949, section 61-4-1 (set out in full, pp. 3-4, *supra*) does not make the filing of an Administrator's Bond a condition precedent to the appointment of an administrator, but merely provides that he will not "act as such" until he has filed the required bond. The normal duties of an administrator are to garner, protect and conserve the assets of an estate; to pay the expenses of administration and the lawful creditors of a decedent out of the assets thereof converting so much thereof as is necessary to cash; and finally to make distribution of the residue of the estate in proper ratio to the heirs at law of the decedent. In the instant case preparatory to actually assuming those duties, the administrator caused the Commissioner as Probate Judge to issue a citation to the appellee so that he and the Probate Court could be advised of the value, location and nature of the assets of the decedent which the appellee might have possession of or know about. He was certainly not acting as an administrator in the ordinary sense of the word nor was he actually taking any property into his possession making a bond necessary for the protection of the decedent's heirs and creditors. ACLA 1949, sec. 61-6-2 cited in full, *supra*, p. 3, does not specify that the citation be issued upon request of an executor or administrator who has filed a bond. Furthermore, it is difficult to conceive why any ordinary person would find it necessary to engage the services of an attorney to prevent inquiry made of her as to the assets of a decedent.

Aside, however, from the question of statutory construction, it is clear that the Commissioner as Probate Judge had jurisdiction of the subject matter of the proceeding—an inquiry into the location of the assets of a decedent. Having such jurisdiction, neither she nor her surety could be liable for the issuance of a citation void by reason of some procedural omission or defect.

We believe that the appellant fails to understand the difference between an act in clear absence of jurisdiction for which liability would attach and an act in excess of jurisdiction for which there would be no liability. Had appellant read the opinion in the landmark case of *Bradley v. Fischer*, 13 U.S. (Wallace) 335 cited in her brief as authoritative, she would not have commenced this suit in the first instance.

Particularly she should have heeded the following language commencing at page 351 of that opinion:

“In the present case we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exer-

cise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon

to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons.

The distinction here made between acts done in excess of jurisdiction and acts where no jurisdiction whatever over the subject-matter exists, was taken by the Court of King's Bench, in *Ackerley v. Parkinson*.* In that case an action was brought against the vicar-general of the Bishop of Chester and his surrogate, who held the consistorial and episcopal court of the bishop, for excommunicating the plaintiff with the greater excommunication for contumacy, in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin, the citation issued to him being void, and having been so adjudged. The question presented was, whether under these circumstances the action would lie. The citation being void, the plaintiff had not been legally brought before the court, and the subsequent proceedings were set aside, on appeal, on that ground. Lord Ellenborough observed that it was his opinion that the action was not maintainable if the ecclesiastical court had a general jurisdiction over the subject-matter, although the citation was nullity, and said, that 'no authority had been cited to show that the judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or, as it is termed, *inverso ordine*.' Mr.

*3 Maule & Selwyn, 411.

Justice Blanc said there was a 'material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;' and held that where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should by reason of the error be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction.

The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public

prosecution in the form of impeachment, or in such other form as may be specially prescribed.”

Although the Supreme Court’s opinion refers specifically to courts of general jurisdiction, the rule as stated is generally held to be and should be equally applicable to courts of inferior jurisdiction. 30 Am. Jur. (Judges), Sections 43 and 44, pages 756, 757.

CONCLUSION.

It is appellee’s conclusion on the basis of statutory construction and applicable precedents that appellee could not be liable to appellant under any conceivable set of circumstances provable under the allegations of her Amended Complaint.

It is appellee’s further conclusion that the Court below was completely devoid of any jurisdiction to entertain appellant’s “Motion to Reargue” on its merits in view of appellant’s election to appeal from the Court’s Order of Dismissal.

For appellant’s benefit, it may be noted that this cause is incorrectly captioned in this Court. It is appellant’s recollection that appellant was permitted to amend the title of the cause in the Court below by proper designation of the plaintiff as the “United States of America ex rel. Grace Lowe.”

Appellee prays that the Court confirm the order of the Court below and that appellee be allowed costs

incurred for the printing of this brief and such other costs as may be incurred herein.

Dated, Fairbanks, Alaska,
September 21, 1956.

Respectfully submitted,
WILLIAM V. BOGGESS,
Attorney for Appellee.

No. 15172

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

W. B. JONES LUMBER COMPANY, INC. and
LUMBER AND SAWMILL WORKERS'
UNION, LOCAL 2288, AFL, Respondents.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

NOV - 9 1956

PAUL R. O'BRIEN, CLERK

No. 15172

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

W. B. JONES LUMBER COMPANY, INC. and
LUMBER AND SAWMILL WORKERS'
UNION, LOCAL 2288, AFL, Respondents.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer of W. B. Jones Lbr. Co., Inc. (G.C. 1-J)	1
Answer of W. B. Jones Lbr. Co., Inc. to Peti- tion for Enforcement	85
Answer of Lumber and Sawmill Workers Union, etc., to Petition for Enforcement ...	80
Certificate of the National Labor Relations Board	74
Decision and Order	67
Exceptions of Respondent Union to the Intermediate Report	43
Intermediate Report and Recommended Order	9
Conclusions of Law	35
Findings of Fact	12
Recommendations	36
Letter of July 7, 1955, Arthur Garrett to National Labor Relations Board	5
Order to Show Cause	3
Petition for Enforcement of an Order of the National Labor Relations Board	77

ii.

Return and Answer to Order to Show Cause and Argument in Support of	6
Affidavit of Richard Smith	8
Statement of Points to be Relied Upon (USCA): Petitioner, National Labor Relations Board	89
Respondent Union	83
Respondent W. B. Jones Lbr. Co., Inc.	88
Transcript of Proceedings and Testimony'	91
Exhibits for General Counsel:	
1-J—Answer of W. B. Jones Lbr. Co., Inc.	1
3—Document on Letterhead of Sprague Eng. Corp. "W. B. Jones Lbr. Co., Inc. Purchases 1/1/54 to 12/31/54"	217
Admitted in Evidence	109
4—Letter dated Nov. 8, 1954, Eldon Kraal, Ex. Sec. to Wm. H. Knight	218
Admitted in Evidence	131
5—Letter dated Nov. 12, 1954, G. M. Purscell, Fin. Sec. to Wm. H. Knight	220
Admitted in Evidence	131
6—Minutes of Executive Committee Meet- ing of Willamette Valley District Council, April 7, 1954	220
Admitted in Evidence	131

Transcript of Proceedings—(Continued)

Exhibits for General Counsel (Continued):

33—(Rejected) Summary of Sales to Out of State Customers, Mississippi Glass Co.	222
--	-----

Marked for Identification	195
---------------------------------	-----

Witnesses:

Braley, William G.	
—direct	153

Fee, George Crossmond	
—direct	165
—cross	175

Fierke, Capitola	
—direct	200
—cross	206

Frederickson, Roy C.	
—direct	191

Hardy, Alexander W.	
—direct	110
—cross	117

Jones, William B.	
—direct (For Petitioner)	95
—direct (For Respondent)	149

Lancaster, Robert H.	
—direct	177
—cross	188

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Lee, Joseph L.

—direct 211

—cross 212

McCully, Harry

—direct 207

—cross 209

Merrill, Willis H.

—direct 101

—cross 105

Morse, Robert

—direct 212

Nicoson, James M.

—direct 93

Oyster, Robert

—direct 145

Rutledge, Oric O.

—direct 189

Smith, Richard

—direct 194

—cross 197

Tooze, Don Frank

—direct 120

—cross 140

GENERAL COUNSEL'S EXHIBIT 1-J

United States of America
Before the National Labor Relations Board
Twenty-First Region
Case No. 21-CA 2116

W. B. JONES LUMBER COMPANY, INC.
and
DON F. TOOZE, an Individual.

ANSWER OF W. B. JONES LUMBER COMPANY, INC.

Comes now the respondent above named, W. B. Jones Lumber Company, Inc. and answers the complaint on file herein as follows:

I.

Answering the allegations contained in Paragraphs II, III, V, VI, VIII, IX, XII and XIII, this defendant denies generally and specifically each, every and all of the said allegations and denies that Don F. Tooze at any time requested reinstatement as an employee of this answering respondent.

II.

Answering the allegations contained in Paragraphs IV, VII, X, XI and XIV, this answering defendant has no information or belief sufficient to enable it to answer same, placing its denial on that ground, denies each, every and all of the said allegations.

For a second, separate and affirmative answer to the complaint on file herein, this respondent admits, denies and alleges as follows:

I.

That on or about November 17, 1954 this respondent was advised by the Lumber and Sawmill Workers Union, Local 2288 A. F. L., that Don F. Tooze was no longer a member in good standing of the said union, and was no longer eligible for employment with the respondent, and was ordered by said union to dismiss and discharge the said Don F. Tooze, notwithstanding that the respondent was and has been at all times satisfied with said Don F. Tooze was an employee and worker. That the said union further advised this respondent that unless the said Don F. Tooze was forthwith discharged that the said union would cause a picket line to be placed at this respondent's plant. That in order to avoid this eventuality and because said Don F. Tooze was no longer a member in good standing of the union, and to comply with the said union notice, this respondent discharged the said Don F. Tooze. That at all times mentioned herein this respondent has been ready and willing to reinstate the said Don F. Tooze to this respondent's employ.

Wherefore this respondent prays that the complaint on file herein as to this respondent be dismissed, and that the complainant take nothing by virtue thereof, and for such other and further relief

as to the National Labor Relations Board may seem proper.

Dated this 2nd day of May, 1955.

/s/ JOHN M. McCORMICK,
Attorney for W. B. Jones Lum-
ber Company, Inc.

Duly Verified.

Affidavit of Service by Mail Attached.

United States of America

Before the National Labor Relations Board

Division of Trial Examiners

Branch Office

San Francisco, California

Case No. 21-CA-2116

W. B. JONES LUMBER COMPANY, INC.

and

DON F. TOOZE, An Individual

Case No. 21-CB-671

LUMBER AND SAWMILL WORKERS'

UNION, LOCAL No. 2288, AFL

and

DON F. TOOZE, An Individual

ORDER TO SHOW CAUSE

A question having arisen concerning the accuracy of the transcript of a portion of testimony of the

witness Richard Smith, given in the above proceeding, it is

Ordered that the parties in this proceeding show cause before the undersigned at his office, Room 205, 630 Sansome Street, San Francisco, California, at 10 a.m. on July 11, 1955, why the transcript of testimony of the said witness should not be corrected by substituting the figures \$324,015.68 for the figures \$32,415.68 at line 3, page 293 of the said transcript; and it is further

Ordered that in lieu of appearing in person or through the person of counsel at the said time and place, the parties may adduce such evidence as they may respectively desire on the subject of the question raised above by means of duly sworn affidavits, and may submit such written arguments as may appropriately bear on the question, the said affidavits and written arguments to be filed in triplicate with the undersigned, either by mail or by other means of delivery, at his said office on or before 10 a.m., July 11, 1955.

Dated: July 5, 1955.

/s/ HERMAN MARX,
Trial Examiner

Affidavit of Service and Postal Return Receipts
Attached.

ARTHUR GARRETT

Attorney at Law

2200 W. 7th Street

Los Angeles 57, California

DUnkirk 5-1457

Counselor, Los Angeles County District

Council of Carpenters

July 7, 1955

Mr. Herman Marx, Trial Examiner

National Labor Relations Board

630 Sansome Street

San Francisco, California

Re: W. B. Jones and Don F. Tooze, Cases Nos.
21-CA-2116; 21-CA-671

Dear Sir:

Referring to a document which we received in the mail from you yesterday entitled Order to Show Cause with respect to correcting the transcript of the testimony of Richard Smith, it is the position of the respondent union that the Trial Examiner has no authority to take any action in the correction of the transcript since his province is to conduct the hearing and make findings upon the transcript as made. He is not a party to the proceeding and has no right to make any change in any transcript.

In the absence of any motion of any of the parties or a stipulation of the parties for the purpose of correcting the transcript, we object and protest the issuance of the Order to Show Cause as being

improvidential and that the Order to Show Cause should be withdrawn.

Very truly yours,

ARTHUR GARRETT and
JAMES M. NICOSON,

/s/ By ARTHUR GARRETT,
Attorneys for Respondent

AG:meh

cc: Paul A. Weil, Counsel for the General Counsel,
National Labor Relations Board, 111 West Sev-
enth St., Los Angeles 14, California
John M. McCormick, Esq., 417 South Hill
Street, Los Angeles 13, California

[Title of Board and Causes.]

RETURN AND ANSWER TO ORDER TO
SHOW CAUSE AND ARGUMENT IN
SUPPORT OF THE ORDER

Comes now Paul E. Weil, Counsel for the General Counsel, in the above proceeding, in response to an Order to Show Cause why the transcript of testimony of the witness Richard Smith, given in said proceeding, should not be corrected by substituting the figures \$324,015.68 for the figures \$32,415.68 at line 3, page 293 of the said transcript and argues as follows:

The testimony of witness Richard Smith, starting on line 3, page 290 of transcript, shows on line 22, page 291 that the witness prepared a summary

which was marked for identification as General Counsel's Exhibit No. 33 (page 292, line 3) from which he testified to the total of the sums of the invoices (page 293, line 3) and which was offered as General Counsel's Exhibit No. 33 (page 293, line 19) and excluded by the Trial Examiner (page 293, line 25). Subsequently, the rejected General Counsel's Exhibit No. 33 was ordered placed in the rejected Exhibit file by the Trial Examiner (page 300, line 11).

The witness Richard Smith has made his affidavit, offered herewith, to the effect that he testified from that document (rejected G.C. 33) that the office copy of the document from which he testified shows the figure with which the Order to Show Cause is concerned to be \$324,015.68, and that that is the correct amount of Mississippi Glass Company's sales as evidenced by the invoices summarized in the document from which he testified.

The rejected Exhibit file which is presently in the hands of the Trial Examiner will show the correct figure of \$324,015.68.

It may be pointed further that the reason given by the Trial Examiner for rejecting General Counsel's Exhibit No. 33 for identification is that "His evidence is in as to that amount" (page 293, line 25).

Conclusion

The undersigned Counsel for the General Counsel requests that the Trial Examiner order that the transcript be corrected by substituting the figures

\$324,015.68 for the figures \$32,415.68 at line 3, page 293, of the said transcript.

Alternatively, it is requested that the Trial Examiner withdraw his ruling excluding General Counsel's Exhibit No. 33 for identification and admit said Exhibit for the reason that the transcript of the witness's testimony does not correctly reflect the evidence as to the amount given by the witness.

Dated at Los Angeles, California, this 7th day of July, 1955.

Respectfully submitted,

/s/ PAUL E. WEIL,

Counsel for the General Counsel,
National Labor Relations Board

AFFIDAVIT

State of California,

County of Los Angeles—ss.

I, Richard Smith, being first duly sworn on my oath, depose and say:

I am that same Richard Smith who testified in the matter of W. B. Jones Lumber Company, Inc., et al. and Don F. Tooze, Case No. 21-CA-2116, et al., on May 26, 1955, at Los Angeles, California. At the time of my testimony I testified from a copy of a summary of the Company's business which is kept on file in our office. The copy from which I testified was offered in evidence and was not received. I have no present recollection of the exact amount to which I testified in answer to the question by Mr. Weil: "Will you tell me the total of the

sums of the invoices?" but I recall that I testified to the amount which appeared on the summary which I consulted at that time.

I have checked the office copy of the summary to which I referred in my testimony and I find thereon that the figure to which I testified is \$324,015.68. That is the correct amount of our sales as evidenced by the invoices summarized in the document from which I testified.

I have read the foregoing affidavit, and to the best of my knowledge it is true and correct.

/s/ RICHARD SMITH

Sworn and Subscribed to before me this 7th day of July, 1955.

/s/ PAUL E. WEIL,

Attorney,

National Labor Relations Board

[Title of Board and Causes.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Mr. Paul E. Weil, of Los Angeles, Calif., for the General Counsel. Mr. John Michael McCormick, of Los Angeles, Calif., for the Company. Messrs. James M. Nicoson, Arthur Garrett, and Lewis Garrett, of Los Angeles, Calif., for the Union.

Before: Herman Marx, Trial Examiner.

Statement of the Case

On November 18, 1954, Don F. Tooze filed two charges with the National Labor Relations Board

(also designated herein as the Board), one in Case No. 21-CA-2116 against the Respondent, W. B. Jones Lumber Company, Inc. (also designated herein as the Company), and the other in Case No. 21-CB-671 against the Respondent, Lumber and Sawmill Workers' Union, Local No. 2288, AFL (also referred to herein as the Union or Local 2288). The cases were subsequently consolidated for hearing pursuant to an order entered by the Regional Director of the Twenty-first Region of the Board. On April 21, 1955, the General Counsel of the Board duly issued a complaint based upon the charges, alleging that the Company and the Union had engaged, and were engaging, in unfair labor practices affecting commerce within the meaning of the National Labor Relations Act, as amended (61 Stat. 136-163), referred to herein as the Act. Each of the Respondents has been duly served with copies of the charge filed against it, and of the complaint and the order consolidating the cases.

With respect to the alleged unfair labor practices, the complaint charges, in effect, that on or about November 17, 1954, Local 2288 informed the Company that Tooze was not a member of the Union in good standing and demanded that he be discharged for reasons other than a failure to pay dues and initiation fees uniformly required by Local 2288 of its members; that the Company discharged Tooze on or about November 17, 1954, in compliance with the demand; that on or about the said date, and thereafter, the Union refused to give Tooze "clearance" for employment with the

Company although he “offered to pay and tendered initiation fees uniformly required of union members”; that on or about November 19, 1954, the Company failed and refused to reinstate Tooze unless he presented to the Company “written clearance from Respondent Union or an order from the National Labor Relations Board that he should be reinstated”; that the conduct attributed to the Company, as described above, violated Sections 8 (a) (1) and 8 (a) (3) of the Act; and that the Union by its conduct set out above violated Sections 8 (b) (1) (A) and 8 (b) (2) of the said Act.

The Company and the Union filed separate answers. That of the Company in effect denies the commission of the acts attributed to it in the complaint and, as a separate defense, alleges that Tooze was a satisfactory employee; that on or about November 17, 1954, the Union informed it that Tooze was no longer a member of the organization in good standing and ineligible for employment with the Company; that the Union “ordered” the Company to discharge Tooze, stating that unless he was dismissed, the organization would cause a picket line to be placed at the Company’s premises; that the Company discharged Tooze “to avoid this eventuality” and because Tooze was no longer a member of the Union in good standing; and that the Company “has been ready and willing to reinstate” Tooze to its employ. The Union’s answer, in material substance, denies the commission of the unlawful conduct imputed to Local 2288 in the complaint, and affirmatively alleges that the Board is without ju-

risdiction over this proceeding because the Company "is not engaged in a business affecting commerce."

Pursuant to notice duly served upon all parties, a hearing was held before me, as duly designated Trial Examiner, on May 9, 10, 25, 26 and 27, 1955, at Los Angeles, California. The General Counsel, the Union, and the Company were each represented by counsel and participated in the hearing. All parties were afforded a full opportunity to be heard, examine and cross-examine witnesses, adduce evidence, submit oral argument and file briefs. After the close of the evidence the Company and the Union moved to dismiss the complaint. Decision was reserved on the motions. They are hereby denied upon the basis of the applicable findings and conclusions set out below. The Union has filed a brief which has been read and considered. The other parties have not filed briefs.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a California corporation. It operates a lumber yard in the City of Los Angeles, California, where it is engaged in the business of selling lumber at retail and wholesale. The Company employs between 15 and 35 persons, the number varying with fluctuations in its volume of business.

In 1954, all of the goods sold by the Respondent were delivered by it to customers in California, with the exception of products valued at \$34,260.71, which were shipped from the Company's place of business to points in Nevada. These direct interstate shipments, standing alone, are insufficient for the assertion of jurisdiction under criteria promulgated by the Board in Jonesboro Grain Drying Cooperative, 110 NLRB No. 67. The evidence, however, presents another basis for the assertion of jurisdiction under standards established by the Jonesboro case. During the calendar year 1954, the Company sold and delivered products valued in the aggregate in excess of \$200,000 to the concerns listed below, each of whom, during the said year, shipped goods valued in excess of \$50,000,¹ from

¹ Richard Smith, office manager of Mississippi Glass Company, one of the Respondent Company's customers, testified to the value of his firm's interstate shipments in 1954, as totalled from the concern's invoices. The transcript of his testimony reflects him as testifying that the value was \$32,415.68. These figures do not correspond to notes I made while Smith testified. According to my notes, Smith testified that the value was \$324,015.68. After Smith stated the figures, the General Counsel offered a tabulated summary, prepared by Smith, of his firm's interstate shipments in 1954 and of the value of the products so shipped. The proffered exhibit was identified as G. C. Exh. 33. The exhibit specified the sum of \$324,015.68 as the total value of the shipments. Upon the Union's objection, the exhibit was rejected. On July 5, 1955, I issued an order requiring the parties to show cause on July 11, 1955 why the transcript should not be corrected. A copy of the Order to Show Cause was duly served

points within the state of California to places in

upon each of the parties. The Company has made no return to the Order to Show Cause. The Union made no formal return, but, through its counsel, has addressed a letter to me, dated July 7, 1955, taking the position in effect that a Trial Examiner has no authority to correct a transcript, and that in the absence of any motion by the parties or a stipulation for the correction of the transcript, the "Order to Show Cause is improvidential * * * and should be withdrawn." The Union's position is without merit. Section 102.35 of the Board's Rules and Regulations imposes the duty upon a Trial Examiner assigned to the hearing of a case "to inquire fully into the facts," and, among other things, empowers him to "dispose of procedural requests or similar matters"; to "call, examine and cross-examine witnesses, and to introduce into the record documentary and other evidence"; and "to take any other action necessary under the foregoing and authorized by the published Rules and Regulations." It may be noted that the Union's letter advances no claim that the transcript accurately reflects Smith's testimony. The General Counsel has filed a return, requesting that the transcript be corrected by substituting the figures \$324,015.68 for the figures \$32,415.68 in Smith's testimony or, in the alternative, that the ruling rejecting G. C. Exh. 33 be withdrawn and that the exhibit be received in evidence. Appended to the General Counsel's return is an affidavit by Smith to the effect that he has no "present recollection of the exact amount" to which he testified, but that he testified to the amount which appears in the summary (G. C. Exh. 33) which he prepared, and that the sum of \$324,015.68 which appears therein is the "correct amount" of the "sales as evidenced by the invoices summarized in the document." There is no doubt that the transcript inaccurately quotes Smith with respect to the figures he gave. Accordingly, the transcript is hereby corrected by deleting the figures \$32,415.68

other states.² The following tabulation sets forth

in Smith's testimony at line 3, page 293, of the transcript and substituting therefor the figures \$324,015.68. The Order to Show Cause, the letter dated July 7, 1955, from counsel for the Union, the General Counsel's return and Smith's affidavit are hereby made part of the record. The General Counsel's application that the ruling rejecting G. C. Exh. 33 be withdrawn is denied. However, as Smith's affidavit refers to the exhibit, and since both should be read together for purposes of clarity, I hereby grant the General Counsel's request that the exhibit be received in evidence, but it is received for the single purpose of serving as an explanatory supplement to Smith's affidavit.

² In its brief, the Union contends that the testimony of various witnesses relating to the dollar volume of interstate shipments of a number of the customers should be disregarded as non-probative. In support of its position, the Union cites *N. L. R. B. v. Haddock-Engineers, Ltd.*, 215 F. 2d 734 (C. A. 9). The contention in effect reiterates objections made by the Union at the hearing to testimony given by a number of the witnesses. Each of the witnesses upon whose testimony findings concerning interstate shipments are based holds either a supervisory, administrative or fiscal position with the customer concerning whose shipments he testified. It would be an idle act to determine what portions, if any, of the testimony would be non-probative in a proceeding arising under another law, for the Act contains its own evidentiary guide. Section 10 (b) of the Act provides that unfair labor practice proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable to the district courts of the United States * * *" (emphasis supplied). Thus, by the very terms of the Act, adherence to evidentiary rules is not always required. *N. L. R. B. v. Hunter*

the names of the Company's customers mentioned above,³ and the value of the products sold to each by the Company in 1954:

Sprague Engineering Corporation	\$ 9,069.13
Johnston Pump Company.....	8,197.70
Stauffer Chemical Company.....	10,220.85
Wolf Range & Manufacturing Company	6,803.33
Mission Appliance Company.....	14,415.13

Engineering Co., 215 F. 2d 916 (C. A. 8); *N. L. R. B. v. Local 1418*, etc., 212 F. 2d 846 (C.A. 5). Plainly, this is true where it would be impracticable to adhere to them. As the record sufficiently reflects the objections, the underlying reasons for the rulings, and the testimony given, it is unnecessary here to collect and analyse the many variable situations involved. Suffice it to say, that upon foundations reflected in the record, the terms of Section 10 (b) warranted the admission of the testimony in the form given. The Union apparently misreads the *Haddock* case in seeking to apply it here. Substantially, the evidentiary point at issue there was whether a written admission bearing on commerce facts, made by a respondent employer, was binding upon a respondent union. The phrase "so far as practicable," as used in Section 10 (b), was not involved in the case, and the Court had no occasion either to apply or construe it. In short, the *Haddock* case is inapposite.

³ The record contains evidence pertaining to sales made by the Company to other customers, and to the volume of their business. It is unnecessary to set out details of such evidence, inasmuch as the Company's sales to, and the interstate shipments made by, the customers listed in the tabulation, without reference to any others, satisfy criteria for the assertion of jurisdiction described in the *Jonesboro* case.

Hammond Manufacturing	
Company	18,662.20
Mississippi Glass Company.....	30,028.40
Southern Heater Corporation.....	8,274.67
C. & M. Manufacturing Company..	26,734.94
Docummon Metals & Supply	
Company	19,705.88
National Supply Company.....	20,801.55
Columbia Pictures Corporation...	11,531.97
Chrysler Corporation	8,010.35
Phelps Dodge Copper Products	
Corporation	4,192.64
Morris D. Kirk & Sons, Inc.....	14,263.83
Total.....	<u>\$210,912.57</u>

I find that the Company's operations affect interstate commerce within the meaning of the Act, that the Board has jurisdiction over this proceeding, and that the assertion of jurisdiction herein will effectuate the policies of the Act.

II. The labor organization involved

The Union admits persons employed by the Company to membership and is a labor organization within the meaning of the Act.

III. The alleged unfair labor practices

A. Prefatory findings

The president of the Company is named William B. Jones. He supervises the firm's operations. One of his managerial subordinates is the yard superintendent, Alex Hardy. Hardy directs the work of employees in the lumber yard and is vested with

authority to hire and discharge employees subject to his supervision. Both Jones and Hardy are supervisors within the meaning of the Act.

Local 2288 has collective bargaining relations with a group of lumber concerns described by Jones in his testimony as "the big five." The Union and the group customarily negotiate collective bargaining agreements. The Company is not a member of the negotiating group, but adopts and follows whatever contract provisions result from the negotiations. The evidence does not specify what form such adoption takes, nor does it describe the provisions of any collective bargaining contract. There is thus no proof that at any time relevant to this proceeding the Company was a party to a valid union security agreement requiring membership in Local 2288 as a condition of employment.

During the early part of 1954, Don F. Tooze was in the employ of a concern in Oakridge, Oregon. While so employed, he was a member of a labor organization described in the record (G. C. Exh. 5) as United Brotherhood of Carpenters and Joiners, Union No. 2453 (also referred to herein as Local 2453). The record suggests that Local 2453 is affiliated with an organization known as the Willamette Valley District Council (described below as the Council), and that the latter exercises disciplinary powers over members of Local 2453.

In March 1954, the Council brought a disciplinary proceeding against Tooze before one of its committees upon charges of what is commonly called dual unionism. As a result of the proceeding, he

was "placed on probation" for three years, and subjected to various disabilities, including ineligibility "for a withdrawal card or clearance card for a period of three years." The terms of his probation required him to "pay dues regularly and remain in good standing," and provided that upon violation of such terms, he be "forever debarred from membership and all rights and benefits of the United Brotherhood of Carpenters and Joiners of America."

Tooze left his employment in Oakridge in April 1954. He thereafter held a miscellany of jobs in Oregon for brief periods and then came to Southern California. In June 1954, he fell into arrears in the monthly dues payments required by Local 2453 of its members, and as of November 1954, his arrearages totalled \$17.25.

Tooze entered the Company's employ as a fork-lift operator on October 28, 1954. He was hired by Superintendent Hardy and thereafter worked under the latter's supervision in the Company's lumber yard. When he was hired, Tooze was not a member of Local 2288, nor has he since secured membership.

A business representative of Local 2288 frequently visits the Company's lumber yard for such purposes as ascertaining whether any new men had been employed, whether these were members of Local 2288, and whether employees were in arrears in their dues. For some four years prior to Tooze's employment by the Company, the representative of Local 2288 who performed these functions was a man named John Matzko. It was Matzko's practice

to come to the yard each week, usually on Wednesday, and discuss matters related to the union membership status of employees, customarily transacting his business with Hardy.

On November 3, 1954 Matzko came to the yard and introduced himself to Tooze as a representative of Local 2288. Apparently proceeding on the assumption that Matzko wished to look into his union membership status, Tooze told the union representative about the charges brought against him in Oregon and that he had been "found guilty" of them. After some discussion of the charges, Matzko said that he would write to Local 2453 or the Council about the matter, and that he would "have to pull (Tooze) off the job," if what Tooze had told him turned out to be accurate.

Later that day, Tooze went to the office of Local 2288 and spoke to another of its representatives, a man named Knight. Tooze gave Knight the same account of the disciplinary proceeding as he had given Matzko, stating, also, that he had "never received any official notice" that he had been found guilty of the charges or of any penalties imposed upon him. Matzko came into the office during the conversation. Knight told Matzko to give Tooze a work permit for December, and informed Tooze that he would write to Local 2453 to "find out just what the situation was." Matzko told Tooze to return at a later date for the work permit.

Tooze continued to work for the Company after his conversation with Knight. On or about November 12, 1954, he called at the union office for the

purpose of securing the work permit.⁴ He was accompanied by another employee of the Company, named Robert Oyster, who had also recently been hired and desired a work permit. Matzko was present during the conversation that ensued between Knight and Tooze. Knight declined to issue the work permit to Tooze, telling the latter: "We couldn't do much for you, Tooze. You are not a member in good standing." Knight showed Tooze three documents. One of these was a letter dated November 12, 1954, addressed to Knight by Local 2453, describing Tooze's dues arrearages. Another was a letter dated November 8, 1954, addressed to Knight by the Council. This letter describes Tooze as "a perpetual trouble maker so far as our organization is concerned," and summarizes the charges against Tooze and the results of the disciplinary proceeding. The third document purports to contain an excerpt from the minutes of a meeting of the Executive Committee of the Council, setting forth the report of the Trial Committee which had heard the charges against Tooze. Tooze read the documents and made an offer to Knight to pay the dues owed to Local 2453, and "to join the union over

⁴Tooze estimated that this visit was on the Friday of the week following the one in which the first conversation occurred. According to this estimate, the date of the second visit would be November 12, 1954. However, since on this occasion, Knight showed him a letter from Local 2453 bearing that date, it is not unlikely that the second visit took place somewhat later than Tooze's estimate indicates. In any event, the precise date does not affect the concluding findings reached below.

again." Knight rejected the offer, telling Tooze that he "couldn't become a member twice." Tooze asked, "Doesn't the Taft-Hartley Law protect me?" Knight walked away, saying "Don't talk Taft-Hartley Law to me." That ended the conversation. Unlike Tooze, Oyster was given a work permit.

Matzko spoke to Tooze on November 17, while the latter was at work in the Company's yard. The Union's agent said that he was "going to have to pull (Tooze) off the job" and would talk to Jones about the matter. Tooze then sought out Hardy and, in Matzko's presence, told the superintendent that Local 2288 "was pulling (him) off the job." Hardy asked Matzko for the reason, and the latter replied that Tooze was not a member of Local 2288. Hardy also inquired of Matzko whether Tooze could complete the day's work. The union representative responded that Tooze would "have to leave right then." Hardy complained that he would have to pay Tooze for a full day's work, and Matzko stated that that would not be necessary. During the course of the conversation Hardy asked Matzko what would happen if Tooze were retained, and Matzko stated that Local 2288 would "put a picket line around the yard." The upshot of the discussion was that Hardy acquiesced in Matzko's demand and discharged Tooze.⁵

⁵ Hardy and Tooze gave somewhat differing versions of the conversation between the former and Matzko. The versions are not significantly dissimilar, and I have based findings on a composite of both. It may be noted that, whatever the differ-

On the following day, Tooze telephoned Hardy and asked the superintendent if Jones would reinstate him in the event that he "got squared away with the union." Hardy replied, "Yes, Don, get something in writing either from the union or from the National Labor Relations Board and come back to work." Hardy also assured Tooze that he had not been discharged for "any infraction of the rules," and that all that the Company wanted was the "writing" mentioned above.

Tooze came to the yard the following morning (on November 19) and told Hardy that he was ready to report for work. The superintendent inquired whether Tooze "had anything in writing from the union or the National Labor Relations Board." Tooze replied in the negative, but produced a copy of the Act and offered it to Hardy to read. The superintendent declined to read it. The conversation ended with a statement by Tooze to the effect that there was a possibility that he would file a charge against the Company with the Board.

On one occasion or another (the record does not specify the date), Hardy told Jones that Tooze "was a good man he (Hardy) wanted to keep." Jones expressed a wish to see Tooze "to see if we can get it straightened out," and when Tooze came to the Company's office on or about November 24 to pick up his pay check, Hardy took him to see Jones.

ences, both accounts are in substantial accord that Matzko demanded that the Company discharge Tooze because he was not a member of Local 2288, and that the Company complied with the demand.

During the course of the conversation that followed, Jones in effect expressed a willingness to re-employ Tooze and advised the latter to pay whatever dues he owed and to eliminate his difficulties with Local 2288. Tooze informed Jones that he had already offered to pay the dues arrearages, and that he would follow Jones' suggestion.⁶

Tooze left Jones and proceeded directly to the Union's office. He asked an office employee there if he could see Knight and was informed that the latter was indisposed. Tooze then told the employee that he had come to pay his "back dues," but she stated that she could not accept them. At this point Knight emerged from his office and approached the others. Tooze told the office employee that he "wanted to join the union over again." Knight interposed and said that Tooze was "already a member of the union" and "couldn't become a union

⁶ Tooze and Jones were in substantial accord in their testimony concerning the features of the conversation described above. There are some variances between them concerning other aspects of the meeting, relating principally to whether Jones read the documents Matzko had previously given Tooze. (It is undisputed that Tooze handed the papers to Jones.) The differences need not be resolved. A resolution would not affect the conclusions reached below since Tooze had already been discharged and, in effect, denied unconditional reinstatement by Hardy on two occasions some days earlier. It is evident that a determination that during the conversation Jones read the papers or was familiarized with Tooze's difficulties in Oregon would not affect whatever liabilities had already been incurred by the company.

member twice." Tooze protested that "the constitution and bylaws" did not preclude acceptance of his offer, to which Knight replied that Tooze was "already a member of the union but * * * (had) no withdrawal card," and that Local 2288 could not accept dues owed by Tooze to "another union." In addition to his offer to pay the dues he owed Local 2453, Tooze sought to join Local 2288, for he made an offer to Knight to pay the initiation fee and two months' dues in advance required by the Union of new members, but Knight rejected the offer. At the time he made this offer, Tooze had "far more" money in his hand than the amount he owed Local 2453. (In his undisputed account of the conversation, Tooze did not specify how much he had in his hand.) Knight also told Tooze that the latter "should have gotten in touch" with him before Tooze filed an unfair labor practice charge against Local 2288. With that the conversation ended and Tooze left the office.⁷

B. Concluding findings

As a preface to the conclusions to be drawn from the evidence, it is appropriate to sift out and dis-

⁷ Jones gave undisputed testimony to the effect that either while Tooze was in his office or shortly before, he (Jones) spoke to Knight on the telephone, and that the latter agreed that all Tooze had "to do is pay those back dues" in order to return to work. It is evident that Knight changed his mind at one point or another. Since it would not affect the concluding findings set out below, it need not be determined whether the filing of the charge against the Union with the Board was a factor in Knight's rejection of any of Tooze's offers.

pose of a number of features of the record which do not materially affect the results required by the operative facts in this proceeding.

First, the fact that Matzko threatened to place a picket line at the Company's yard if Tooze were not discharged has no bearing on the Company's liability for the discharge. The Company may not legally justify the dismissal on the ground that it feared reprisal at the Union's hands if it did not comply with Matzko's demand. *N. L. R. B. v. Fry Roofing Co.*, 193 F. 2d 324 (C. A. 9), and cases cited.

Second, the offers to re-employ Tooze, whether made by Hardy or Jones, do not in any way diminish the Company's liability for any discrimination it practiced against Tooze. The offers of reinstatement were not unconditional, but, on the contrary, were coupled in practical effect, if not in precise terms, with the condition that he secure the sanction of the Union for his reinstatement or, as an alternative (voiced by Hardy) an order from the Board directing the reinstatement. Because of the conditions, the offers were actually tantamount to unlawful denials of reinstatement.

Third, in its brief, Local 2288 deals at some length with the disciplinary proceeding against Tooze in Oregon, his dues arrearages there, and the right of Local 2288 to refuse to accept the dues Tooze owed to another union.⁸ But what the brief does not make clear is how all this endowed Local

⁸ The claim is also made in the Union's brief that Tooze "had been expelled from the union" because of his dues delinquency. The brief does not make

2288 with any legal right to demand that the Company discharge Tooze. It is well settled that a labor organization may validly cause an employer to discharge an employee because of nonmembership in the union only if the dismissal is authorized by an applicable agreement, valid under Section 8 (a) (3) of the Act, making membership in the labor organization a condition of employment. *Radio Officers' Union v. N.L.R.B.*, 347 U. S. 17. The burden of justifying the discharge as a lawful application of a valid union security agreement is upon the Respondents. *Construction and General Laborers Union, Local 320*, 96 NLRB 118, 119. Neither Respondent presented evidence of such an agreement, and neither relies upon one to justify the discharge. It is evident that none exists.⁹ The nub of the mat-

clear at the point in question whether the "union" referred to is Local 2453 or United Brotherhood of Carpenters and Joiners of America. Actually, there is no evidence that Tooze had in fact been expelled from either, but, in any event, as will appear, whether such expulsion took place does not affect any issue in this proceeding.

⁹ Even if a valid union shop agreement between the Company and Local 2288 had been in existence, the discharge, and the Union's role in it, would have been unlawful. Where an applicable valid union security agreement exists, Section 8 (a) (3) immunizes an employee from discharge, because of nonmembership in the contracting union, for a period of 30 days from the commencement of his employment. Tooze was discharged within the 30-day period. Thus, putting aside the plain fact that Local 2288 barred Tooze from membership, the existence of a valid union shop agreement would not have the effect of validating either the discharge or the Union's demand for the dismissal.

ter is that Tooze's difficulties in Oregon, his dues arrearages there, and the right of Local 2288 to refuse to accept payment of such dues, afford no absolution for the Union's conduct in seeking Tooze's discharge.

Fourth, in oral argument at the hearing the Company took the position that the discharge did not violate the Act because the only reason given by Matzko was that Tooze "had not paid his dues." This view of the reason is not quite accurate, for the reason given by Matzko to Hardy, according to the latter's testimony, was that "Tooze was not in the union and could not work." Be that as it may, what the Company's version of the reason implies is that the Union had an unrevealed motive for demanding the discharge, namely, that Tooze was *persona non grata* to Local 2288 because of his union difficulties in Oregon. In an effort to absolve itself of liability, the Company harnesses its conception of what Matzko told Hardy to certain language of Section 8 (a) (3). That section contains three provisos which follow the language prohibiting discrimination. The first in effect carves out an exception validating discrimination based upon the application of a lawful union security agreement. The remaining provisos read: "Provided further, that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has

reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." It is unnecessary to speculate whether Hardy believed that Tooze was "not in the union" because of a failure by him to pay dues to that organization or for some other reason, nor is it necessary to determine whether the Company should have gone farther than it did in inquiring into the Union's motive and whether it had good reason to conclude that all that was behind the organization's attitude toward Tooze was a mere failure by him to pay "periodic dues" to Local 2288. The decisive point is that the provisos are inapplicable to the facts in this proceeding. The quoted language, as the Board has held, "spell(s) out two separate and distinct limitations on the use of the type of union security agreements permitted by the Act" (Union Starch and Refining Company, 87 NLRB 779, 783, enforced 186 F. 2d 1008 (C. A. 7)). The Company does not rely upon a valid union security agreement to justify the discharge. Hence, the provisos have no bearing on any issue in this case, and afford no defense to the Company.¹⁰

¹⁰ I deem it unnecessary to make findings concerning the Union's real motive for raising barriers to Tooze's employment. It is enough that the reason given Hardy by Matzko was that Tooze was not a member of the Union, that the Company based its dismissal on that reason (as the Company's answer in effect concedes), and that the discharge was not

The operative facts bearing on the question of the legality of the discharge are clear. The sum of the matter is that on November 17, 1954, the Union demanded of the Company that Tooze be discharged on the ground that he was not a member of Local 2288;¹¹ that the Company complied with the demand, and discharged Tooze on November 17, 1954 because he was not a member of the Union; that the discharge was not authorized by the terms of a valid union security agreement; that the Company because of the Union's demand, described above, has since refused to give Tooze unconditional reinstatement to his position; that by discharging Tooze and refusing to reinstate him, the Company discrimi-

grounded upon the application of a valid union security agreement. In that posture of the evidence, whatever hidden motives the Union had for its conduct cannot affect the Company's responsibility for the discrimination it practiced against Tooze. Construction and General Laborers Union, Local 320, 96 NLRB 118, 119.

¹¹ The Union takes the position in its brief "that there is no proof that Matzko held any representative capacity with the Respondent Union to bind it by his actions." The contention lacks merit. On that score, one may note Superintendent Hardy's account of his dealings with Matzko over a period of some four years prior to Tooze's dismissal, and the undisputed evidence of Tooze's conversations with Knight and Matzko in the Union's office. In short, there is ample evidence that Matzko's demand for Tooze's discharge was at least within the apparent scope of the authority vested by the Union in Matzko. Such apparent authority is enough to bind the Union. See Restatement, Agency, Secs. 219, 228, 233-237; *Acme Mattress Co.*, 91 NLRB 1010, enforced 192 F. 2d 524 (C. A. 7).

nated against him and violated Sections 8 (a) (1) and 8 (a) (3) of the Act; that, as a result of its demand, the Union caused the Company to discriminate against Tooze in violation of Section 8 (a) (3) of the Act; and that the Union thereby violated Sections 8 (b) (1) (A) and 8 (b) (2) of the Act.

The complaint alleges as separate violations of Sections 8 (b) (1) (A) and 8 (b) (2), respectively, that the Union "failed and refused to give * * * Tooze clearance" for employment with the Company. The allegation is amply supported by the evidence. It is clear that Local 2288 arrogated to itself the right to determine whether the Company could employ Tooze. The Union in effect informed Tooze as early as November 3, 1954 of its power to veto his employment when Matzko told the former that he would "have to pull (him) off the job," if Tooze's description of his difficulties in Oregon turned out to be true. Plainly, at least from the time Matzko spoke to Tooze on that date, the latter believed that he would not be able to work for the Company without the sanction of Local 2288. (The fact that Tooze was discharged on November 17 is ample evidence that the belief was justified). Tooze sought that sanction, in effect, when he requested Knight, on or about November 12, 1954, to give him a work permit, and when he offered on or about November 24, 1954, to pay Knight the dues and initiation fees required by Local 2288 of new members or, in other words, to join Local 2288. Knight's refusal to issue the permit and his rejection of Tooze's offer to join Local 2288 were in effect a de-

nial by the Union of its sanction for Tooze's employment by the Company. The natural tendency of the Union's conduct in the premises was to restrain and coerce employees in the exercise of guarantees accorded them by Section 7 of the Act. Moreover, in the light of the evidence as a whole, such conduct was tantamount to an attempt to cause the Company to discriminate against Tooze in violation of Section 8 (a) (3). Accordingly, the refusal by the Union, on or about November 12 and 24, 1954, as found above, to give its sanction for Tooze's employment violated Sections 8 (b) (1) (A) and 8 (b) (2) of the Act.¹²

IV. The effect of the unfair labor practices upon commerce

The respective activities of the Respondents set forth in Section III, above, occurring in connection with the operations of the Company, described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor

¹² Section 8 (b) (1) (A), forbidding restraint and coercion of employees by labor organizations, contains a proviso that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The finding made above does not impair that right, since the quoted proviso does not excuse practices which, as in this case, are used by a union as instruments to effect unlawful discrimination in employment. *Utah Construction Co.*, 95 NLRB 196, 206, n. 25; *Local 153, UAW, CIO*, 99 NLRB 1419, 1421.

disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

It has been found that the Company has engaged in unfair labor practices violative of Sections 8 (a) (1) and 8 (a) (3) of the Act, and that the Union has engaged in unfair labor practices in violation of Sections 8 (b) (1) (A) and 8 (b) (2) of the said statute. In view of the findings, I shall recommend that the Respondents cease and desist from their respective unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

As it has been found that the Company discharged Don F. Tooze on November 17, 1954, and subsequently refused to reinstate him, that such discharge and refusals to reinstate violated Section 8 (a) (3) of the Act, and that the Union caused the Company to discharge Don F. Tooze and to refuse to reinstate him in violation of Section 8 (a) (3) I shall recommend that the Company offer Don F. Tooze immediate and full reinstatement to his former or a substantially equivalent position,¹³ without prejudice to his seniority and other rights and

¹³ In accordance with the Board's past interpretation, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See *The Chase National Bank of the City of New York, San Juan, Puerto Rico Branch*, 65 NLRB 827.

privileges, and that the Company and the Union jointly and severally make the said Don F. Tooze whole for any loss of pay he may have suffered by reason of the Company's discrimination against him, by payment to him of a sum of money equal to the amount of wages he would have earned, but for his discharge, between November 17, 1954 and the date of a proper offer of reinstatement to him as aforesaid. Loss of pay shall be computed on the basis of each separate calendar quarter or portion thereof during the period from the date of the discharge to the date of a proper offer of reinstatement. The quarterly periods shall begin with the respective first days of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which Don F. Tooze normally would have earned, but for the discrimination, in each such quarter or portion thereof, his net earnings,¹⁴ if any, in any other employment during that period. Earnings in one quarter shall have no effect upon the back pay liability for any other quarter. Both the Company and the Union will be required, upon reasonable request, to make available to the Board and its agents all records pertinent to an analysis of the amount due as back pay and to the order for reinstatement.

As it has been found that the Company, in violation of Section 8 (a) (1) of the Act, has interfered with, restrained, and coerced employees in the exercise by them of rights guaranteed by Section 7 of

¹⁴ See *Crossett Lumber Company*, 8 NLRB 440, for the applicable construction of "net earnings."

the said statute, and that the Union, in violation of Section 8 (b) (1) (A), has restrained and coerced employees in the exercise of such rights, I shall recommend that the Company and the Union be directed to cease and desist in the future from committing their said respective violations of the Act.

Upon the basis of the foregoing findings of fact and of the entire record in this proceeding, I make the following:

Conclusions of Law

1. Lumber and Sawmill Workers' Union, Local No. 2288, AFL, is, and has been at all times material to this proceeding, a labor organization within the meaning of Section 2 (5) of the Act.

2. W. B. Jones Lumber Company, Inc. is, and at all times material to this proceeding has been, an employer within the meaning of Section 2 (2) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Don F. Tooze the Company has engaged in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

4. By interfering with, and restraining and coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act, the Company has engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

5. By attempting to cause, and by causing, the Company to discriminate in regard to the hire and tenure of employment of Don F. Tooze in violation of Section 8 (a) (3), the Union has engaged in un-

fair labor practices within the meaning of Section 8 (b) (2) of the Act.

6. By restraining and coercing persons employed by the Company in the exercise of rights guaranteed to them by Section 7 of the Act, the Union has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2 (6) and 2 (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that:

1. W. B. Jones Lumber Company, Inc., its officers, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Encouraging membership of its employees in Lumber and Sawmill Workers' Union, Local 2288, AFL, or any other labor organization, or discouraging membership in any labor organization, by discriminatorily discharging its employees or in any other manner discriminating against them in regard to their hire, tenure or any other term or condition of employment, except as authorized by Section 8 (a) (3) of the Act;

(b) In any like or similar manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choos-

ing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer to Don F. Tooze immediate and full reinstatement to his former, or a substantially equivalent, position, without prejudice to his seniority and other rights and privileges, and jointly and severally with Lumber and Sawmill Workers' Union, Local 2288, AFL, make him whole in the manner and according to the method set forth in Section V, above, entitled "The remedy";

(b) Post in conspicuous places, including places where notices to employees are customarily posted, at its principal place of business in Los Angeles, California, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region of the Board shall, after being signed by a duly authorized official representative of the Company, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the said Regional Director in writing,

within 20 days from the date of the receipt of this Intermediate Report and Recommended Order, what steps the said Company has taken to comply with the foregoing recommendations.

2. Lumber and Sawmill Workers' Union, Local 2288, AFL, its officers, representatives, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Causing, or attempting to cause, W. B. Jones Lumber Company, Inc., or any other employer, except as authorized by Section 8 (a) (3) of the Act, to discharge employees or in any other manner discriminate against them in regard to their hire, tenure of employment or any term or condition of employment, because such employees are not members of the Union;

(b) In any like or similar manner restraining or coercing employees of W. B. Jones Lumber Company, Inc., or of any other employer, in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Jointly and severally with W. B. Jones Lum-

ber Company, Inc. make Don F. Tooze whole in the manner and according to the method set forth in Section V, above, entitled "The remedy";

(b) Post in conspicuous places, including places where notices to members are customarily posted, at its office and its usual membership meeting place, copies of the notice attached hereto and marked Appendix B. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region of the Board, shall, after being duly signed by a duly authorized representative of the said Union, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by said Union to insure that said notices are not altered, defaced, or covered by any other material;

(c) Forthwith mail copies of the said notice marked Appendix B to the said Regional Director, after such copies have been signed as provided in Paragraph 2 (2) (b) of these recommendations, for posting at the place of business of the Company, if it so agrees.

(d) Notify the said Regional Director in writing, within 20 days from the date of the receipt of this Intermediate Report and Recommended Order, what steps the said Union has taken to comply with the foregoing recommendations applicable to it.

It is further recommended that, unless or before 20 days from the receipt of this Intermediate Report and Recommended Order, the Company and the Union notify the said Regional Director in writing that they will comply with the foregoing rec-

ommendations respectively applicable to them, the National Labor Relations Board issue an order requiring the Respondents to take the actions respectively required of them above.

Dated this 18th day of July, 1955.

/s/ HERMAN MARX,
Trial Examiner

APPENDIX A

Notice to All Employees: Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not encourage membership by our employees in Lumber and Sawmill Workers' Union, Local No. 2288, AFL, or any other labor organization, or discourage membership in any labor organization, by discriminatorily discharging employees or in any other manner discriminating against them in regard to their hire, tenure of employment, or any term or condition of employment, except as authorized by Section 8 (a) (3) of the National Labor Relations Act.

We Will Not in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the pur-

pose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will offer Don F. Tooze immediate and full reinstatement to his former, or a substantially equivalent, position without prejudice to his seniority and other rights and privileges.

We Will jointly and severally with Lumber and Sawmill Workers' Union, Local No. 2288, AFL, make Don F. Tooze whole for any loss of pay he suffered as a result of discrimination against him.

All of our employees are free to become, remain, or refrain from becoming, members of any labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

W. B. JONES LUMBER COM-
PANY, INC.
(Employer)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice to Members of This Union and Employees of W. B. Jones Lumber Company, Inc. Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

We Will Not cause, or attempt to cause, W. B. Jones Lumber Company, Inc., or any other employer, except in accordance with Section 8 (a) (3) of the National Labor Relations Act, to discharge employees or in any other manner discriminate against them in regard to their hire, tenure of employment, or any term or condition of employment, because such employees are not members of Lumber and Sawmill Workers' Union Local No. 228, AFL.

We Will Not in any like or similar manner restrain or coerce employees of W. B. Jones Lumber Company, Inc., or of any other employer, in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will jointly and severally with W. B. Jones Lumber Company, Inc. make Don F. Tooze whole for any loss of pay he suffered as a result of discrimination against him.

LUMBER AND SAWMILL WORK-
ERS' UNION, LOCAL No. 2288,
AFL,
(Labor Organization)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service and Postal Return Receipts Attached.

[Title of Board and Causes.]

RESPONDENT'S EXCEPTIONS TO THE INTERMEDIATE REPORT

Comes now the Respondent, Lumber and Sawmill Workers' Union Local No. 2288, AFL, and files this, its exceptions to certain findings and conclusions of the Trial Examiner made in his Intermediate Report in the above matter, as follows.

I.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate

Report commencing with the word "The" on line 62, page 2 of said Report and ending with the word "case in line 2 of page 3 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

II.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Richard" in line 8 of page 3 and ending with the word "affidavit" in line 62 of page 3 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

III.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "During" in line 2 of page 3 and ending with the word "states" in line 1 of page 4 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

IV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "In" in line 24 of page 4 and ending with the word "inapposite"

in line 57 of page 4 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

V.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "It" in line 59 of page 4 and ending with the word "case" in line 64 of page 4 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

VI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "I" in line 1 of page 5 and ending with the word "Act" in line 4 of page 5 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

VII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "After" in line 15 of page 6 and ending with the word "accurate" in line 18 of page 6 of said Report for the reason that such findings and conclusions are not sup-

ported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

VIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Later" in line 20 of page 6 and ending with the word "Knight" in line 21 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

IX.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Tooze" in line 21 of page 6 and ending with the word "conversation" in line 25 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

X.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Knight" in line 25 of page 6 and ending with the word "permit" in line 28 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record

considered as a whole and are contrary to the law of the case.

XI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "On" in line 31 of page 6 and ending with the word "permit" in line 32 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "He" in line 32 of page 6 and ending with the word "permit" in line 34 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Matzko" in line 34 of page 6 and ending with the word "Tooze" in line 35 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XIV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Knight" in line 35 of page 6 and ending with the word "standing" in line 37 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Knight" in line 37 of page 6 and ending with the word "documents" in line 38 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XVI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "One" in line 38 of page 6 and ending with the word "proceeding" in line 44 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XVII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 44 of page 6 and ending with the word "again" in line 49 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XVIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Knight" in line 49 of page 6 and ending with the word "conversation" in line 52 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the laws of the case.

XIX.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Unlike" in line 52 of page 6 and ending with the word "permit" in line 53 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XX.

Respondent excepts to the findings and conclu-

sions of the Trial Examiner in his Intermediate Report commencing with the word "Tooze" in line 56 of page 6 and ending with the word "below" in line 62 of page 6 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Matzko" in line 1 of page 7 and ending with the word "matter" in line 3 of page 7 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Tooze" in line 4 of page 7 and ending with the word "job" in line 6 of page 7 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXIII.

..

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Hardy" in line

6 of page 7 and ending with the word “necessary” in line 10 of page 7 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXIV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word “During” in line 11 of page 7 and ending with the word “Tooze” in line 14 of page 7 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word “On” in line 16 of page 7 and ending with the word “above” in line 22 of page 7 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXVI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word “Tooze” in line 24 of page 7 and ending with the word “Board” in line 31 of page 7 of said Report for the reason

that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXVII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "On" in line 33 of page 7 and ending with the word "keep" in line 35 of page 7 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXVIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Jones" in line 35 of page 7 and ending with the word "Jones" in line 37 of page 7 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXIX.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "During" in line 37 of page 7 and ending with the word "suggestion" in line 42 of page 7 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record

considered as a whole and are contrary to the law of the case.

XXX.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 46 of page 7 and ending with the word "both" in line 47 of page 7 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXXI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "It" in line 47 of page 7 and ending with the word "demand" in line 51 of page 7 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXXII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Tooze" in line 52 of page 7 and ending with the word "company" in line 63 of page 7 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXXIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Tooze" in line 1 of page 8 and ending with the word "office" in line 1 of page 8 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXXIV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "He" in line 2 of page 8 and ending with the word "indisposed" in line 3 of page 8 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXXV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Tooze" in line 3 of page 8 and ending with the word "them" in line 5 of page 8 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXXVI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "At" in line 5 of page 8 and ending with the word "union" in line 12 of page 8 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXXVII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "In" in line 12 of page 8 and ending with the word "office" in line 21 of page 8 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXXVIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Third" in line 47 of page 8 and ending with the word "union" in line 1 of page 9 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XXXIX.

Respondent excepts to the findings and conclu-

sions of the Trial Examiner in his Intermediate Report commencing with the word "Jones" in line 52 of page 8 and ending with the word "offers" in line 60 of page 8 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XL.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 8 of page 9 and ending with the word "Respondents" in line 9 of page 9 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XLI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "It" in line 12 of page 9 and ending with the word "exists" in line 12 of page 9 of said Report for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole and are contrary to the law of the case.

XLII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "the" in line

14 of page 9 and ending with the word "discharge" in line 16 of page 9 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XLIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Be" in line 23 of page 9 and ending with the word "Oregon" in line 26 of page 9 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XLIV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Actually" in line 46 of page 9 and ending with the word "proceeding" in line 49 of page 9 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XLV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Even" in line 50 of page 9 and ending with the word "dismissal" in line 60 of page 9 of said Report for the reason

that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XLVI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 7 of page 10 and ending with the word "proceeding" in line 8 of page 10 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XLVII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 17 of page 10 and ending with the word "Act" in line 29 of page 10 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

XLVIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 32 of page 10 and ending with the word "Company" in line 34 of page 10 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record

considered as a whole and are contrary to the law of the case.

XLIX.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 34 of page 10 and ending with the word "Tooze" in line 37 of page 10 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

L.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 37 of page 10 and ending with the word "true" in line 3 of page 11 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "It" in line 40 of page 10 and ending with the word "agreement" in line 45 of page 10 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "In" in line 45 of page 10 and ending with the word "Tooze" in line 47 of page 10 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 51 of page 10 and ending with the word "merit" in line 51 of page 10 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LIV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "On" in line 51 of page 10 and ending with the word "office" in line 55 of page 10 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LV.

Respondent excepts to the findings and conclu-

sions of the Trial Examiner in his Intermediate Report commencing with the word "In" in line 55 of page 10 and ending with the word "Union" in line 58 of page 10 of said Report for the reason that such findings and conclusions are not supported by substantial evidence in the record considered as a whole and are contrary to the law of the case.

LVI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Plainly" in line 3 of page 11 and ending with the word "Local 2288" in line 5 of page 11 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LVII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 5 of page 11 and ending with the word "justified" in line 7 of page 11 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LVIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Knight" in

line 11 of page 11 and ending with the word "Company" in line 13 of page 11 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LIX.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 13 of page 11 of said Report and ending with the word "Act" in line 16 of page 11 for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LX.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "Moreover" in line 16 of page 11 and ending with the word "Act" in line 21 of page 11 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 26 of page 11 and ending with the word "commerce" in line 31 of page 11 of said Report for the reason

that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "It" in line 36 of page 11 and ending with the word "Act" in line 41 of page 11 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "As" in line 43 of page 11 and ending with the word "reinstatement" in line 19 of page 12 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXIV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "The" in line 55 of page 11 and ending with the word "employment" in line 58 of page 11 of said Report for the reason that such findings and conclusions are not sup-

ported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXV.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "As" in line 21 of page 12 and ending with the word "Act" in line 27 of page 12 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXVI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "1. Lumber" in line 34 of page 12 and ending with the word "Act" in line 36 of page 12 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXVII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "3. By" in line 43 of page 12 and ending with the word "Act" in line 45 of page 12 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record con-

sidered as a whole and are contrary to the law of the case.

LXVIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "4. By" in line 47 of page 12 and ending with the word "act" in line 50 of page 12 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXIX.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "5. By" in line 1 of page 13 and ending with the word "Act" in line 4 of page 13 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXX

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "6. By" in line 6 of page 13 and ending with the word "Act" in line 9 of page 13 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXXI.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "7. The" in line 10 of page 13 and ending with the word "Act" in line 12 of page 13 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXXII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "2. Lumber" in line 6 of page 14 and ending with the word "it" in line 55 of page 14 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

LXXIII.

Respondent excepts to the findings and conclusions of the Trial Examiner in his Intermediate Report commencing with the word "It" in line 1 of page 15 and ending with the word "above" in line 7 of page 15 of said Report for the reason that such findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the law of the case.

Having duly excepted, respondent prays that the

complaint in these matters be dismissed in their entirety.

Respectfully submitted,

ARTHUR GARRETT
& JAMES M. NICOSON,
/s/ By ARTHUR GARRETT,
Attorneys for Respondent.

United States of America

Before the National Labor Relations Board

Case No. 21-CA-2116

W. B. JONES LUMBER COMPANY, INC.

and

DON F. TOOZE, An Individual

Case No. 21-CB-671

LUMBER AND SAWMILL WORKERS'
UNION LOCAL No. 2288, AFL

and

DON F. TOOZE, An Individual

DECISION AND ORDER

On July 18, 1955, Trial Examiner Herman Marx issued his Intermediate Report in the above-entitled consolidated proceedings, finding that the Respondents had engaged in and were engaging in certain

unfair labor practices, and recommending that the Respondents cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent Union filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in these cases and hereby adopts the findings, conclusions and recommendations of the Trial Examiner¹ except as modified herein.²

¹ We find no merit in the contention of the Respondent Union that the record does not contain sufficient reliable evidence to establish that the operations of the Respondent Employer satisfy the Board's minimum standards for the assertion of jurisdiction. See *Amalgamated Meat Cutters and Butcher Workmen*, 81 NLRB 1051.

² The Trial Examiner recommended that the Respondents be ordered to cease and desist from in any like or similar manner infringing upon the rights of employees as guaranteed by the Act. Because we believe that a discriminatory discharge goes to the very heart of the Act and because we believe that the Respondents' repeating the commission of the violations involved herein in the future may be anticipated by reason of the conduct of the Respondents herein, we shall order that Respondents cease and desist from in any manner infringing upon the rights of employees as guaranteed by the Act. *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. A. 4).

ORDER

Upon the entire record in these cases and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. W. B. Jones Lumber Company, Inc., its officers, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Encouraging membership of its employees in Lumber and Sawmill Workers' Union, Local 2288, AFL, or any other labor organization, or discouraging membership in any labor organization, by discriminatorily discharging its employees or in any other manner discriminating against them in regard to their hire, tenure or any other term or condition of employment, except as authorized by Section 8 (a) (3) of the Act;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which

the Board finds will effectuate the policies of the Act:

(a) Offer to Don F. Tooze immediate and full reinstatement to his former, or a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and jointly and severally with Lumber and Sawmill Workers' Union, Local 2288, AFL, make him whole in the manner and according to the method set forth in Section V of the Intermediate Report and entitled "The remedy";

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social-security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order;

(c) Post in conspicuous places, including places where notices to employees are customarily posted, at its principal place of business in Los Angeles, California, copies of the notice attached hereto as Appendix A.² Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region of the Board shall, after being signed by a duly authorized official representative of the Company, be posted by it immediately upon receipt

² In the event this Order is enforced by decree of a United States Court of Appeals there shall be inserted before the words, "A Decision and Order" the words "A Decree of the United States Court of Appeals, Enforcing an Order."

thereof and maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the said Regional Director in writing within 10 days from the date of this Order, what steps the said Company has taken to comply with the foregoing.

2. Lumber and Sawmill Workers' Union, Local 2288, AFL, its officers, representatives, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Causing, or attempting to cause, W. B. Jones Lumber Company, Inc., or any other employer, except as authorized by Section 8 (a) (3) of the Act, to discharge employees or in any other manner discriminate against them in regard to their hire, tenure of employment or any term or condition of employment, because such employees are not members of the Union;

(b) In any other manner restraining or coercing employees of W. B. Jones Lumber Company, Inc., or of any other employer, in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organi-

zation as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Notify W. B. Jones Lumber Company, Inc., Los Angeles, California, and Don F. Tooze, in writing, that it has no objection to the employment by the Company of the said Don F. Tooze and request the Respondent Company to offer Don F. Tooze immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority and other rights and privileges;

(b) Jointly and severally with W. D. Jones Lumber Company, Inc. make whole Don F. Tooze in the manner and according to the method set forth in Section V of the Intermediate Report entitled "The Remedy";

(c) Post in conspicuous places, including places where notices to members are customarily posted, at its office and its usual membership meeting place, copies of the notice in the form attached hereto as Appendix B.³ Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region of the Board, shall, after being duly signed by a duly authorized representative of the said Union, be posted by it immediately upon receipt thereof

³ In the event this Order is enforced by decree of a United States Court of Appeals there shall be inserted before the words, "A Decision and Order" the words "A Decree of the United States Court of Appeals, Enforcing an Order."

and maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by said Union to insure that said notices are not altered, defaced, or covered by any other material;

(d) Forthwith mail copies of the said notice marked Appendix B to the said Regional Director, after such copies have been signed as provided in Paragraph 2 (2) (c) of this Order, for posting at the place of business of the Company, if it so agrees;

(e) Notify the said Regional Director in writing, within 10 days from the date of this Order, what steps the said Union has taken to comply with the foregoing.

Dated, Washington, D. C., Oct. 14, 1955.

[Seal] PHILIP RAY RODGERS,
 Acting Chairman,
 ABE MURDOCK, Member,
 IVAR H. PETERSON, Member,
 BOYD LEEDOM, Member,
 National Labor Relations Board

[Note: Appendix A and B are the same as those set out at pages 40-43 except for the words "Pursuant to A Decision and Order.]

Affidavit of Service by Mail and Postal Return
Receipts Attached.

In the United States Court of Appeals
For the Ninth Circuit

No. 15172

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

W. B. JONES LUMBER COMPANY, INC. and
LUMBER AND SAWMILL WORKERS'
UNION, LOCAL 2288, AFL, Respondents.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, “W. B. Jones Lumber Company, Inc. and Don F. Tooze, an Individual”; and “Lumber and Sawmill Workers’ Union Local No. 2288, AFL and Don F. Tooze, an Individual,” the same being known as Case Nos. 21-CA-2116 and 21-CB-671 respectively before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said consolidated proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Herman Marx on May 9, 10, 25, 26, and 27, 1955, together with all exhibits introduced in evidence and rejected exhibit.

2. Trial Examiner Marx's Order to Show Cause dated July 5, 1955, together with affidavit of service and United States Post Office return receipts thereof.

3. Letter dated July 7, 1955 from counsel for Respondent Lumber and Sawmill Workers' Union, Local 2288, AFL, (hereinafter called respondent Union) objecting to issuance of Trial Examiner's Order to Show Cause.

4. General Counsel's Return and Answer to Order to Show Cause and Argument in Support of the Order, dated July 7, 1955.

5. Copy of Trial Examiner Marx's Intermediate Report and Recommended Order (annexed to item 7 hereof); and copy of Order transferring case to the National Labor Relations Board, both issued on July 18, 1955, together with affidavit of service and United States Post Office return receipts thereof.

6. Respondent Union's exceptions to the Intermediate Report received by the Board on August 9, 1955.

7. Copy of Decision and Order issued by the National Labor Relations Board on October 14, 1955, with copy of Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 27th day of July, 1956.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board

[Endorsed]: No. 15172. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. W. B. Jones Lumber Company, Inc. and Lumber and Sawmill Workers' Union, Local 2288, AFL, Respondents. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed: July 31, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 15172

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

W. B. JONES LUMBER COMPANY, INC. and
LUMBER AND SAWMILL WORKERS'
UNION, LOCAL 2288, AFL, Respondents.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondents, W. B. Jones Lumber Company, Inc. (hereinafter called Respondent Company), its officers, agents, successors, and assigns, and Lumber and Sawmill Workers' Union, Local 2288, AFL (hereinafter called Respondent Union), its officers, representatives, agents, successors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "W. B. Jones Lumber Company, Inc. and Don F. Tooze, an Indi-

vidual, Case No. 21-CA-2116; Lumber and Sawmill Workers' Union Local No. 2288, AFL and Don F. Tooze, an Individual, Case No. 21-CB-671."

In support of this petition the Board respectfully shows:

(1) Respondent Company is a California corporation engaged in business in the State of California and Respondent Union is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on October 14, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent Company, its officers, agents, successors, and assigns, and to the Respondent Union, its officers, representatives, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending copies thereof postpaid, bearing Government frank, by registered mail, to Respondents' Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of

the entire record of the consolidated proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, finding of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent Company, its officers, agents, successors, and assigns, and Respondent Union, its officers, representatives, agents, successors, and assigns, to comply therewith.

Dated at Washington, D. C., this 22nd day of June, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board

[Endorsed]: Filed June 25, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF LUMBER AND SAWMILL
WORKERS' UNION LOCAL 2288, AFL, TO
PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

Comes now Lumber and Sawmill Workers' Union Local 2288, AFL, hereinafter referred to as Respondent Union, and for itself and no other files this its answer to the petition of the National Labor Relations Board for enforcement of an order of the National Labor Relations Board, and admits, denies and alleges, as follows:

I.

Answering Paragraph (1) of the petition, Respondent Union admits that it is a labor organization engaged in promoting and protecting the interests of its members in the State of California within this judicial circuit, but denies generally and specifically that Respondent Union committed any unfair labor practices within this or any other judicial district, or that Respondent Union has committed any unfair labor practices of any nature. Respondent Union denies that by virtue of Section 10 (e) of the National Labor Relations Act as amended this court has jurisdiction of these proceedings. Respondent Union admits that W. B. Jones Lumber Company, Inc. is a California corporation engaged in business in the State of California.

II.

Answering Paragraph (2) of the Petition, Respondent Union denies that due proceedings were had before the National Labor Relations Board. Respondent Union admits that on or about October 14, 1955 the National Labor Relations Board issued a purported Findings of Fact and Conclusions of Law, and a purported Order directed to Respondent Union, its officers, representatives, agents, successors and assigns, but Respondent Union denies that either the purported Findings of Fact, Conclusions of Law, or the purported Order were or are supported by substantial evidence on the record considered as a whole, and Respondent Union avers that the purported Conclusions of Law and the purported Order were and are erroneous and are contrary to the law of the case.

Respondent Union admits that the purported Decision and Order, Findings of Fact and Conclusions of Law were served upon Respondent Union.

III.

Answering Paragraph (3) of the Petition, Respondent Union avers that it is without information or knowledge upon which to form a belief as to the allegations of said paragraph, and basing its answer on that ground denies each and every allegation therein contained.

IV.

Affirmatively, Respondent Union alleges:

1. That the National Labor Relations Board does not have jurisdiction over the Respondent Union or

the subject matter of the purported Decision and Order.

2. That Respondent Union has not committed any unfair labor practices.

3. That the purported Findings of Fact, Conclusions of Law and Order are not supported by substantial evidence on the record considered as a whole.

4. That the purported Findings of Fact, Conclusions of Law and the purported Order are each and all contrary to law.

Wherefore, having fully answered, Respondent Union prays that the petition be denied, that the Court make and enter an Order setting aside in full the purported Order of the National Labor Relations Board.

ARTHUR GARRETT and
JAMES M. NICOSON,

/s/ By ARTHUR GARRETT,
Attorneys for Respondent
Union

Certificate of Service Attached.

[Endorsed]: Filed July 16, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
RESPONDENT UNION, LUMBER AND
SAWMILL WORKERS' UNION LOCAL
No. 2288, AFL, INTENDS TO RELY

To the Honorable, the Judges of the United States
Court of Appeals, for the Ninth Circuit:

In concurrence with the rules of this Court, Respondent Union, Lumber and Sawmill Workers' Union Local No. 2288, AFL, for itself and no other hereby states the following points upon which it intends to rely herein.

1. The National Labor Relations Board does not have jurisdiction over the Respondent Union, Lumber and Sawmill Workers' Union Local No. 2288, AFL.

2. That the proceedings before the National Labor Relations Board were unconstitutional, null and void, in that they deprived Respondent Union, Lumber and Sawmill Workers' Union Local No. 2288, AFL, of its rights guaranteed to it by the Fifth Amendment to the Constitution of the United States.

3. That the National Labor Relations Board's Findings of Fact and Conclusions of Law that Respondent Union has committed unfair labor practices are not supported by substantial evidence on the record considered as a whole and therefore are void and of no effect. That the National Labor Relations Board's Order issued herein is not sup-

ported by substantial evidence on the record considered as a whole and is therefore of no effect and void.

4. That the National Labor Relations Board's Findings of Fact, Conclusions of Law and Order issued herein are contrary to law.

5. That the National Labor Relations Board's Findings of Fact, and Conclusions of Law that Respondent Union engaged in conduct in violation of Section 8 (b) (2) and Section 8 (b) (1) (A) of the National Labor Relations Act as amended are not supported by substantial evidence on the record considered as a whole and are therefore void and of no effect.

Respectfully submitted,

ARTHUR GARRETT and
JAMES M. NICOSON,

/s/ By ARTHUR GARRETT,
Attorneys for Respondent Union, Lumber and Saw-
mill Workers' Union Local No. 2288, AFL

Certificate of Service Attached.

[Endorsed]: Filed July 16, 1956. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF W. B. JONES LUMBER CO.,
INC. TO PETITION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LA-
BOR RELATIONS BOARD

Comes now W. B. Jones Lumber Co., Inc. (hereinafter referred to as respondent company) and, for itself and no other, files this its answer to the petition of the National Labor Relations Board for enforcement of an Order of the National Labor Relations Board and admits, denies and alleges as follows:

I.

Answering Paragraph (1) of the petition, respondent company admits that it is a California corporation engaged in business in the State of California within this judicial Circuit and admits that the Lumber and Sawmill Workers' Union Local No. 2288, AFL, is a labor organization engaged in promoting and protecting the interests of its workers in the State of California within this judicial Circuit, but denies generally and specifically that respondent company committed any unfair labor practices within this or any other judicial district, or that respondent company has committed any unfair labor practices of any nature.

Respondent company further denies that, by virtue of Section 10 (e) of the National Labor Relations Act as Amended, this Court has jurisdiction over these proceedings.

II.

Answering Paragraph (2) of the Petition, respondent company denies that due proceedings were had before the National Labor Relations Board. Respondent company admits that on or about October 14, 1955, the National Labor Relations Board issued a purported Findings of Fact and Conclusions of Law and a purported Order directed to respondent company, its officers, representatives, agents, successors and assigns, but respondent company denies that either the purported Findings of Fact, Conclusions of Law or purported Order were or are supported by substantial evidence of the record, considered as a whole, and respondent company avers that the purported Conclusions of Law and the purported Order were and are erroneous and contrary to the law of the case.

Respondent company admits that the purported Decision and Order, Findings of Fact and Conclusions of Law were served upon respondent company.

III.

Answering Paragraph (3) of the Petition, respondent company alleges that it is without information or knowledge upon which to form a belief as to the allegations of said paragraph and basing its answer on that ground denies each, every and all the allegations therein contained.

IV.

For a separate and affirmative defense, respondent company alleges as follows:

(1) That the National Labor Relations Board does not have jurisdiction over the respondent company or the subject matter of the purported Decision and Order.

(2) That respondent company has not committed, nor participated in, nor been a part to any unfair labor practice or practices.

(3) That the purported Findings of Fact, Conclusions of Law, and Order are not supported by substantial evidence on the record, considered as a whole.

(4) That the purported Findings of Fact, Conclusions of Law and the purported Order are and each of them is contrary to law.

Wherefore, having fully answered, respondent company prays that the Petition be denied; that the Court make and enter an Order setting aside in full the purported Order of the National Labor Relations Board; and for such other and further relief as the Court may deem proper in the premises.

/s/ JOHN MICHAEL McCORMICK,
Attorney for W. B. Jones Lumber
Co., Inc., respondent company

Certificate of Service attached.

[Endorsed]: Filed July 31, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
RESPONDENT W. B. JONES LUMBER
CO., INC. INTENDS TO RELY

To the Honorable, the Judges of the United States
Court of Appeals, for the Ninth Circuit:

In concurrence with the rules of this Court, respondent company W. B. Jones Lumber Co., Inc. for itself and no other hereby states the following points upon which it intends to rely herein.

1. The National Labor Relations Board does not have jurisdiction over the respondent company, W. B. Jones Lumber Co., Inc.

2. The proceedings before the National Labor Relations Board were unconstitutional, null and void in that they deprived respondent company, W. B. Jones Lumber Co., Inc., of its rights guaranteed to it by the Fifth Amendment to the Constitution of the United States.

3. The National Labor Relations Board's Findings of Fact and Conclusions of Law that respondent company has committed unfair labor practices are not supported by substantial evidence on the record, considered as a whole, and therefore are void and of no effect. The National Labor Relations Board's Order issued herein is not supported by substantial evidence on the record, considered as a whole, and therefore is of no effect and void.

4. The National Labor Relations Board's Find-

II.

ings of Fact, Conclusions of Law, and Order issued herein are contrary to law.

5. The National Labor Relations Board's Findings of Fact and Conclusion of Law that Respondent company engaged in conduct in violation of Section 8 (a) (1) and Section 8 (a) (3) of the National Labor Relations Act as Amended are not supported by substantial evidence on the record, considered as a whole, and therefore are void and of no effect.

Respectfully submitted,

/s/ JOHN MICHAEL McCORMICK,
Attorney for W. B. Jones Lumber
Co., Inc., respondent company

Certificate of Service Attached.

[Endorsed]: Filed July 31, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In this proceeding, petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board properly asserted jurisdiction over respondents.
2. A summary decree of enforcement should be

issued against respondent Jones since it filed no exceptions to the Intermediate Report.

3. Substantial evidence supports the Board's finding that respondent Union violated Sections 8 (b) (2) and 8 (b) (1) (A) by causing the Company to discriminate against Tooze.

Dated at Washington, D. C. this 27th day of July, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board

[Endorsed]: Filed July 31, 1956. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-2116

In the Matter of W. B. JONES LUMBER COMPANY, INC., and DON F. TOOZE, AN INDIVIDUAL.

Case No. 21-CB-671

In the Matter of LUMBER AND SAWMILL WORKERS' UNION, LOCAL No. 2288, AFL, and DON F. TOOZE, AN INDIVIDUAL.

TRANSCRIPT OF PROCEEDINGS

Hearing Room No. 2, Room 704, 111 West Seventh Street, Los Angeles, California. Monday, May 9, 1955.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

Before: Herman Marx, Trial Examiner.

Appearances: Paul E. Weil, Room 704, 111 West Seventh Street, Los Angeles, California, appearing on behalf of the General Counsel of the National Labor Relations Board. [1]*

John Michael McCormick, 670 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California, appearing on behalf of W. B. Jones Lumber Company, Inc.

*Page numbers appearing at top of page of original Reporter's Transcript of Record.

James M. Nicoson and Arthur Garrett, 2200 West Seventh Street, Los Angeles, California, appearing on behalf of the Lumber and Sawmill Workers' Union, Local No. 2288, AFL. [2]

PROCEEDINGS

* * * * *

Mr. Weil: 1-E, the Consolidated Complaint in Cases Nos. 21-CA-2116, 21-CB-671, dated the 21st day of April, 1955, signed by George A. Yager, Acting Regional Director;

1-F, Order Consolidating Cases Nos. 21-CA-2116 and 21-CB-671, and Notice of Hearing setting the hearing for this date and dated on the 21st day of April, 1955; * * * * * [4]

1-H, Answer of the respondent union in the consolidated case, dated the 2nd day of May, 1955, signed by Arthur Garrett and James Nicoson, attorneys for the respondent union; and

* * * * *

Mr. Nicoson: Respondent union, Local 2288, objects to the receipt of General Counsel's Exhibit 1-E and 1-F on the grounds that they are not signed by the Acting Regional Director for the Twenty-first Region of the National Labor Relations Board and, accordingly, we move to dismiss this proceeding in its entirety. If it's necessary, I'm prepared to take the stand and testify that that is not Mr. Yager's signature on [5] either of those documents.

(Thereupon the documents above-referred to were marked General Counsel's Exhibit No. 1-A through 1-J, inclusive, for identification.)

Trial Examiner: What is your position, Mr. Weil?

Mr. Weil: I must say I'm not that familiar with Mr. Yager's signature but I can take a position on it. It was signed either by Mr. Yager or by an agent of Mr. Yager's designated for that purpose.

Trial Examiner: Assuming that it isn't?

Mr. Weil: Assuming it isn't his own signature, I assume it's a signature of the duly delegated agent of Mr. Yager's.

Mr. Nicoson: The document recites that the General Counsel has "caused it to be signed" by the Acting Regional Director and it is not so signed.

Trial Examiner: I have no objection to taking any evidence you have to offer. I am now going to ask for whatever you have to offer on the motion. I will be glad to receive the evidence.

Mr. Nicoson: All right.

Trial Examiner: Mr. Nicoson is offering himself as a witness and will be sworn.

JAMES M. NICOSON

a witness called by and on behalf of the Respondent Union, being first duly sworn, was examined and testified as follows:

Trial Examiner: We will suspend with the General Counsel's [6] case in chief in order to dispose of the motion.

Go ahead, Mr. Nicoson.

Direct Examination

The Witness: My name is James M. Nicoson, attorney licensed to practice in the State of Califor-

nia with offices at 111 West Seventh Street, Los Angeles 14.

I have been employed by the National Labor Relations Board in the capacity of Regional Attorney during the years 1940 to '48 during which time I became acquainted, well acquainted, I might say, with Mr. George Yager and his signature. I have seen his signature perhaps hundreds of times. I am prepared to testify that the signature on the documents to which I have raised the objection is not the signature of Mr. George Yager, Acting Regional Director of the Twenty-first Region.

Trial Examiner: You so testify, Mr. Nicoson?

The Witness: I so testify.

Trial Examiner: Anything else, sir?

The Witness: That is all.

Trial Examiner: Any questions? [7]

* * * * *

Trial Examiner: Have you any evidence to offer in opposition to the motion?

Mr. Weil: I have no evidence to offer other than I wish to make the statement I have checked during the recess with Mr. Yager who told me it is indeed not his signature but it is his signature as signed by Mr. Harrington who is the chief legal officer at present in the Region and who has express authority to sign documents of this nature.

Trial Examiner: I can not regard your statement as evidence, you understand that? [8]

* * * * *

Trial Examiner: I will take the motion under advisement and pending opportunity for introduc-

tion of any evidence by the General Counsel.

(Witness excused.)

Mr. Nicoson: Your Honor, if I may interpose here now, I'm quite certain that that is not Mr. Yager's signature as I [9] have testified.

I do want on the record to oppose to taking of any evidence or any proceedings under what to me now appears to be an improper and perhaps illegal complaint and notice of hearing. We are not here upon a proper notice signed by a proper person and I object to taking any evidence until that matter is corrected. I am not adverse to letting the matter be postponed until the problem is cleared up, issue, perhaps, a new complaint, but I'm insisting on having a proper complaint before we proceed taking any evidence in this case. [10]

* * * * *

WILLIAM B. JONES

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): What is your full name, sir? [11] A. William B. Jones.

Q. What is your address?

A. My address?

Q. Yes, sir. A. Home or business?

Q. Business.

A. 5036 Long Beach Avenue, Los Angeles 58.

Q. What is that business located at that address? A. Lumber business.

(Testimony of William B. Jones.)

Q. Under what name?

A. W. B. Jones Lumber Company, Inc.

Q. In what state is that corporation registered?

A. You will have to phrase it——

Q. In what state is that business incorporated?

A. California.

Q. What is the general nature of the company's business?

A. Retail and wholesale.

Q. Do you sell anything but lumber?

A. Plywood occasionally and then various lumber products.

Q. How many employees do you employ?

A. 15 to 35.

Mr. Nicoson: 15 to 35?

The Witness: 15 to 40.

Trial Examiner: I take it under given circumstances?

The Witness: Volume and conditions. [12]

* * * * *

Q. Will you tell me what supervisors do you have at the lumber yard?

A. Supervisors?

Q. Yes.

A. We don't call them supervisors. We have Mr. Moore, general manager. We have Mr. Van Ide, the sales manager, V-a-n I-d-e. We have Mr. Alex Hardy, H-a-r-d-y, yard superintendent. [13]

* * * * *

Q. (By Mr. Weil): What labor unions if you know now represent your employees?

* * * * *

(Testimony of William B. Jones.)

The Witness: We have the Lumber and Sawmill Workers', I don't know the local number, and we have a truck drivers' union with the material dealers. I don't know how they phrase themselves.

Q. (By Mr. Weil): Does the company have any contract with any labor organizations, to your knowledge? A. We have contracts, yes.

Mr. Nicoson: Objection. May I strike the answer for the purpose of interposing the objection and object upon the grounds first, that there is no proper foundation having been laid, second, that it is not the best evidence, that if there are contracts, they are the best evidence of themselves. Third, it is incompetent, irrelevant and immaterial, at least at this posture of the record, is hearsay as to the respondent union. [14]

Trial Examiner: I will construe the objection as a motion to strike and deny the motion.

Q. (By Mr. Weil): What is your capacity with the company? A. President.

Q. In that capacity, have you had occasion to negotiate with any labor organization?

A. No.

* * * * *

Q. (By Mr. Weil): Who carries on the negotiations if any there are?

A. The big five, we call them. Five big yards do the negotiating and we go along with the negotiations.

Q. Are you one of the big five? A. No.

(Testimony of William B. Jones.)

Q. Do you adopt the contract that the five big yards negotiate? A. Yes.

Mr. Nicoson: Objected to on the ground it calls for a legal conclusion as to the adoption.

Trial Examiner: Perhaps so but I will let it stand. I overrule the objection.

Q. (By Mr. Weil): Have there ever been any occasions under [15] which the company has negotiated with the union, your company itself has negotiated with the union as to any terms of any contract or as to any grievances?

Mr. Nicoson: Now, I will have to object to that first on the grounds indefinite and no proper foundation having been laid, no union having been even mentioned, hearsay as to this respondent, calls for a conclusion of the witness.

Trial Examiner: Overruled.

Mr. Nicoson: What union is he talking about?

Trial Examiner: We can get down to the refinement of positions, Mr. Nicoson, where we have to define what a table is. I'm going to get on with this hearing. You are entitled to make your position on on the record. If I am in error, I will be reversed or overruled. I have noted your objection and it is overruled.

Now, do you know the question, sir?

The Witness: Will you repeat it, please?

(The question was read.)

Trial Examiner: To be entirely fair, I don't know whether the witness would understand which union from the phrasing of your question. Bear in

(Testimony of William B. Jones.)

mind he referred to two unions before. One of them he identified I think briefly as the Lumber and Sawmill Workers' Union without identifying the local number. I think you owe it to the witness to indicate which union if any you mean. You better rephrase your question. [16]

Mr. Weil: I will rephrase the question.

Q. (By Mr. Weil): Have you or any of the officers of your company had occasion to negotiate with the Lumber and Sawmill Workers' Union which you testified represents some of your employees concerning either contractual terms or grievances, to your knowledge?

A. We don't negotiate grievances. They tell us. We've been told what to do by the union. We have never had any chance to negotiate as far as I'm concerned.

Q. Can you tell me any individual who has so told you what to do on behalf of the union?

A. In a case——

Mr. Nicoson: Wait just a minute. That is objected to on the grounds what he has been told to do is without any proper foundation, certainly hearsay.

Mr. McCormick: I join in that objection.

Trial Examiner: Yes.

Mr. Nicoson: If there is an answer I move to strike it.

Trial Examiner: I think I know what Mr. Weil has in mind. I believe I know what the witness has in mind. I am going to overrule the objections.

(Testimony of William B. Jones.)

Counsel now wants the name of the individual who you say told you what to do.

The Witness: The case we are on right now, Mr. Matzko, I don't know the spelling or correct pronunciation of his name, [17] he told us to fire a man or they would call a strike on the place.

Q. (By Mr. Weil): Is Mr. Matzko an employee of yours?

A. No, he is a delegate from the union, field man, they call him, I think.

Q. Have you had frequent contact with him or any other contact with him on that occasion?

A. Yes, things have come up.

Q. Beg pardon?

A. Various things come up from time to time. I mean that would be lengthy and I don't think pertain to this case. [18]

* * * * *

Q. (By Mr. Weil): When you hire new employees, do you tell them when they are hired that they must join the union?

A. The yard superintendent hires them. I don't know what the procedure is.

Q. Do you tell the union when you hire new employees? A. That I don't know.

Q. Have you given any of your supervisors, the yard superintendent or anyone else, any instructions about telling the union when you have new employees?

Mr. Nicoson: May that be answered yes or no?

Trial Examiner: Yes, answer that yes or no.

(Testimony of William B. Jones.)

The Witness: I don't know if they have been instructed to. Possible under my jurisdiction. [20]

* * * * *

WILLIS H. MERRILL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Give your full name, please.

A. Willis H. Merrill.

Q. Your business address?

A. 1144 West 135th Street, Gardena.

Q. What is your business?

A. Sprague Engineering Corporation as employed in the fabrication and manufacture of aircraft testing and servicing equipment and some aircraft components hydraulic.

Mr. Nicoson: May I have the first part of it read back, please?

(The answer was read.)

Q. (By Mr. Weil): Mr. Merrill, did you at my request prepare a summarization or memorandum concerning the purchase of lumber if any from the Jones Lumber Company? A. That I did.

Q. Handing you what has been marked for identification as [35] General Counsel's Exhibit No. 3, is that the summary that you prepared?

A. It is. [36]

* * * * *

(Testimony of Willis H. Merrill.)

Q. (By Mr. Weil): Mr. Merrill, did you prepare this summary yourself? A. I did.

Q. From the company's books and records?

A. That's right.

Q. What is your position with the company?

A. Secretary-treasurer of the corporation.

Q. And the books and records from which you prepared these are under your control in that capacity? A. That's right, they are.

Q. Referring to the first item appearing thereon, "Raw Material Stock," Exhibit 3 for identification shows the figure \$5,839.70 less cartage, less sales tax and net purchases of \$5,658.43.

Could you explain what that means?

A. Well, in the first place, the lumber which we buy is not bought as an integral part of the equipment that we sell. It is bought for frame work on crating and as it indicates here in the comparison of figures in about 50 percent of our business approximately, the price of the crate is not negotiated in the sales price of the unit. In other words, it is an expense to us. [38]

* * * * *

The Witness: And the other half of the business, as indicated below, this isn't pertinent to your question, I realize, but it has to be given by comparison, it is definitely a part of the sales contract with the customer so that, therefore, in raw material stock of net purchases of \$5,658.43, it is practically impossible for us to allocate or identify it as to interstate sales or local sales. [39]

(Testimony of Willis H. Merrill.)

* * * * *

Q. Do you have any knowledge of what the lumber that you purchased from Jones Lumber Company was used for? [41]

* * * * *

The Witness: I will have to answer I have limited knowledge.

Q. (By Mr. Weil): From where do you derive this knowledge?

A. I derive the knowledge as far as the jobs are concerned from the application of the costs. I have a limited knowledge only in regard to the raw material stock which is the first item.

* * * * *

Q. (By Mr. Weil): Do you have any knowledge of the sales of your company, Mr. Merrill?

A. For the fiscal year ending September 30, 1954, they were approximately \$5,600,000.00.

Mr. Nicoson: You see where we get on those types of questions?

The Witness: I could——

Trial Examiner: Excuse me. You have an objection?

Mr. Nicoson: I have on the highly improper answer to this [42] question by voluntary, giving information over and beyond the question. I move now to strike the answer on the grounds it is not responsive, conclusion of the witness is not the best evidence.

Trial Examiner: There is no evidence before

(Testimony of Willis H. Merrill.)

me that isn't the best evidence. I overrule the objection and deny the motion. Go ahead.

Mr. Nicoson: May I say one thing, what about this figure of something over five million dollars?

Trial Examiner: I made my ruling.

Mr. Nicoson: I understand that, I'm simply trying to understand you.

Trial Examiner: I made my ruling. My ruling is clear. I denied the motion which you made which was responsive to your motion.

Mr. Nicoson: It isn't fair to me if I may say so for the record.

Trial Examiner: I don't know how clearer the statement can be that a motion you made is denied. I don't know of a more forthright way of passing on a motion. Go ahead, sir.

Q. (By Mr. Weil): Will you tell us what proportion of those sales are shipped in interstate commerce if you know?

Mr. Nicoson: Objected to on the grounds no foundation, hearsay, not the best evidence.

Trial Examiner: Let me have the question, please. [43]

(The question was read.)

Mr. Nicoson: May I add to that it calls for a legal conclusion of the witness?

Trial Examiner: It calls for his knowledge. Overruled. Go ahead. You may cross examine and bring out whether his knowledge is good or bad or indefinite. You may answer the question, sir.

(Testimony of Willis H. Merrill.)

The Witness: You want me to answer the question?

Trial Examiner: Yes. You are instructed, that calls for your knowledge.

The Witness: That's right. I can say to my knowledge at least 70 per cent of it is interstate.

* * * * *

Q. (By Mr. Weil): What other uses is that lumber put to, that raw material stock, other than packing and crating if you know?

A. I'm not competent to answer that question.

Q. You mean you don't know what the other uses are? A. That's right.

* * * * *

Cross Examination * * * * *

Q. (By Mr. Nicoson): All right. Will you tell me, now, you mentioned that 70 percent of some figure went into interstate commerce. What figure were you using on that?

A. It is no figure that is here. It is a published figure [45] of annual sales of five million six hundred plus thousand.

Q. And 70 percent of that figure——

A. That's right.

Q. ——moved in interstate commerce?

A. That's right.

Q. Are you prepared to tell me to what points in interstate commerce this material moved?

A. Practically every state in the United States.

Q. Can you give us some example of some of

(Testimony of Willis H. Merrill.)

the persons to whom you shipped and some of the amounts?

A. I could if I were prepared with them. I don't have them in my head.

Q. You don't have that?

A. I know the places but I don't know the amounts or people.

Q. Do you have any idea as to the amounts?

A. No idea at all right here, no. I'm not prepared to answer that question.

Trial Examiner: I wasn't sure whether counsel asked you for some of the people to whom these shipments were made.

The Witness: Yes, I believe he did, sir.

Trial Examiner: Do you know any of those?

The Witness: Well, United States Air Force at Wright-Patterson Field.

Trial Examiner: Where is that located?

The Witness: That is in Dayton, Ohio. Boeing Airplane [46] Company in Wichita, Kansas and, also, in Seattle, Washington. There is Chance Vought in Texas, Bell Aircraft in New York, there's Glen L. Martin Company in Maryland, to name a few.

Trial Examiner: Why don't you name some more if you have them?

The Witness: Well, it will take a little time to reflect. There is the Ford Motor Company in Michigan. There is the Navy in Philadelphia——

Trial Examiner: If you find that is all you can recall, it's all right.

(Testimony of Willis H. Merrill.)

The Witness: That is all.

Q. (By Mr. Nicoson): How much of the 70 percent of interstate commerce did you ship to the Air Force in Dayton, Ohio?

A. I think I couldn't answer without having the figures before me.

Q. How much of the 70 percent figure that moved in interstate commerce did you ship to Boeing at Wichita?

A. I don't know, that is, the exact figures. I wasn't asked to prepare those figures.

Q. How much of the 70 percent did you say interstate commerce was shipped to Boeing at Seattle?

A. I don't even recall the contract price on that one offhand.

Q. How much of the 70 percent was shipped to Texas?

A. I don't know that answer offhand.

Q. How much was sent to Bell Aircraft in New York? [47]

A. I'm sorry, but I have none of the recap of those contracts before me.

Q. Can you tell me the portion of the 70 percent which was sent to Glen Martin?

A. Not as individual items.

Q. Nor as to the Ford Motor Company in Michigan? A. No.

Q. Nor as to the Navy in Philadelphia?

A. No.

Q. Nor as to any of the persons you mentioned?

(Testimony of Willis H. Merrill.)

A. Not with the records I have here. [48]

* * * * *

Mr. Nicoson: Yes. I move to strike the testimony on the grounds it's hearsay, conclusionary on the part of the witness, no proper foundation having been laid, not the best evidence.

Trial Examiner: Referring to all his testimony, I take it?

Mr. Nicoson: Directed to all the testimony. It's otherwise incompetent, immaterial and irrelevant.

Trial Examiner: I will deny the motion.

Mr. Nicoson: I make the same motion with respect to the witness' testimony with respect to interstate commerce and all testimony in that respect.

Trial Examiner: I will deny that motion.

What do you wish to do with General Counsel's 3 for identification?

Mr. Weil: I wish to offer it.

Mr. Nicoson: Objected to on the grounds it is not the best evidence, calls for a conclusion of the witness, hearsay as to this respondent, incompetent, irrelevant and immaterial, no proper foundation having been laid for it.

Mr. McCormick: No objection.

Q. (By Trial Examiner): About how far is Gardena, California, from here?

A. Thirteen miles, sir.

Q. Will you tell me if you know in what form the item gross [49] purchases of raw material stock is kept in your records, what kind of a record is it?

(Testimony of Willis H. Merrill.)

A. You want to see the records?

Q. Have you the records here?

A. Yes, I do.

Q. Have you records corresponding all the items in General Counsel's 3 for identification?

A. Yes, I do. I mean I have the records from which I developed those figures.

Q. You have the records here?

A. Yes, I do.

* * * * *

Trial Examiner: Would you have any objection to leaving those records here for some short period of time?

The Witness: I would rather not, sir. They are the only copies I have of those records.

Trial Examiner: By a short period of time, I meant until tomorrow some time.

The Witness: I would hate to lose any of them. I mean I'm subject to audit by the State Board of Equalization and Air Force and so forth. [50]

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 3 for identification was received in evidence.) [52]

* * * * *

[See page 217.]

ALEXANDER W. HARDY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Will you give your full name and address?

A. Alexander W. Hardy, 6950 Yarmouth Avenue, Reseda.

Q. Are you employed by W. B. Jones Lumber Company? A. Yes.

Q. In what capacity?

A. Yard superintendent.

Q. How long have you been employed as yard superintendent? A. Five years.

Q. Five years. In that capacity, do you have anything to do with the hiring and firing of employees of the company?

A. I do all the hiring in the yards and all the firing.

Q. Do you, did you hire Don F. Tooze, the charging party in this case? A. Yes, sir.

Q. Do you recall when? A. No, I don't.

Q. Do you recall what month?

A. Not offhand.

Q. Do you recall what year?

A. Last year. [92]

Q. In the fall of the year?

A. Say approximately late summer, middle of the year.

* * * * *

(Testimony of Alexander W. Hardy.)

Q. (By Mr. Weil): How long did Mr. Tooze work for the company?

A. Two or three weeks, I believe.

Q. Have you any fault to find with the work that he did? A. No. [93]

* * * * *

Q. (By Mr. Weil): Is Mr. Tooze still employed there? A. No, he isn't.

Q. Was Mr. Tooze discharged by you?

A. No, sir, he wasn't.

Q. Was he discharged? A. Yes.

Q. By whom?

A. That's a difficult question to give a correct answer.

Trial Examiner: Well, were you present when he was discharged?

The Witness: Yes.

Trial Examiner: All right, tell us now what occurred on that occasion.

The Witness: Forced to discharge him.

Mr. Nicoson: I object to——

Trial Examiner: Excuse me. Strike it out.

You were present when he was discharged. Now, who else was present?

The Witness: Union representative.

Trial Examiner: And who else?

The Witness: Several people in the yard. I believe one [94] man here was present at the time.

Trial Examiner: The witness points to somebody in the rear of the room.

The Witness: Mr. Oyster.

(Testimony of Alexander W. Hardy.)

Trial Examiner: I take it that is O-y-s-t-e-r?

The Witness: Yes.

Mr. Nicoson: I still have to object on the ground no foundation having been laid for "tell us what happened on that occasion." He was simply present, hearsay as to the respondent without further foundation.

Trial Examiner: Maybe not binding upon you but certainly binding upon the respondent company. I will take it and see whether or not the evidence is relative.

Tell us what happened on that occasion, who said what.

The Witness: It was noon, we were eating lunch. Mr. Matzko, the union representative, came in. He comes in every week. He no longer comes in, no longer with the union. And said that Don Tooze would have to be fired immediately. I asked him why. He was very vague, gave me no direct answer——

Mr. Nicoson: Object to the conclusions of the witness.

Trial Examiner: Strike "very vague," and strike "no direct answer."

Did he say anything to you at all?

The Witness: Said Mr. Tooze was not in the union and could not work. I asked him if he could finish the day. He said, [95] no, he'd have to leave right then. I asked him what would happen if I didn't let him go. He said they'd put a picket line

(Testimony of Alexander W. Hardy.)

around the yard. We were very busy, I had no alternative.

Mr. Nicoson: Objected to as calling for a conclusion of the witness.

Trial Examiner: Strike "had no alternative."

What, if anything, did you do?

The Witness: I asked Don what the trouble was. First he didn't have much to say. Then he said he wasn't in the union, he would have to go up and see him. I said that if he'd get straightened out with the union he could go right on working. Let it that way for that day.

Trial Examiner: Was Mr. Matzko present at the time the conversation occurred between you and Mr. Tooze?

The Witness: I'm not sure. He was still in the yard. I don't know whether he was in the conversation.

Mr. Nicoson: I move to strike that as hearsay as to the respondent union.

Trial Examiner: I will deny the motion. If he turns out that it is hearsay as to the union in the light of all the evidence, it will be disregarded, not to be considered, but certainly is binding on the company.

Go ahead, sir.

Q. (By Mr. Weil): Did Mr. Tooze ever return to the yard?

A. Yes, at the end of the week he returned, offered to go [96] back to work.

Mr. Nicoson: Pardon?

(Testimony of Alexander W. Hardy.)

Q. (By Mr. Weil): Was anyone else present at that time? A. No.

Mr. Nicoson: I can't understand the witness. He drops his voice at the end of the answer. You—he came back at the end of the week?

The Witness: Came back at the end of the week. I believe on Tuesday or Wednesday Mr. Matzko was in. He came back Friday which was payday.

Mr. Nicoson: Tooze came back Friday?

The Witness: That's right.

Q. (By Mr. Weil): Did you have a conversation with him then?

A. Yes, I did.

Q. Was anyone else present that you can recall?

A. No.

Q. Can you tell us what this conversation was?

Mr. Nicoson: Objection on the ground it calls for hearsay as to this respondent.

Trial Examiner: All right, if hearsay it will be disregarded but is binding on the company. Disregarded as far as respondent union is concerned.

The Witness: I asked Tooze if he got straightened out with the union. He said no. I said we couldn't afford to have a picket line around the yard, I couldn't let him work without [97] being a union member.

Q. (By Mr. Weil): Was there any further conversation that you recall?

A. That is all I recall.

Q. Has Mr. Tooze been back to the yard since that time, to your knowledge? A. No.

(Testimony of Alexander W. Hardy.)

Q. Have you had any further conversation with Mr. Tooze? A. No.

Q. Had you ever had any conversation with Mr. Matzko before this time?

A. On this particular thing?

Q. No, on any matter?

A. I saw him every Wednesday, approximately every Wednesday.

Q. Did he come to the yard every Wednesday?

A. Yes.

Q. Did you converse with him every Wednesday? A. Practically every Wednesday.

Q. What subjects did you converse with Mr. Matzko?

A. New men and who wasn't paying their dues. He always come to me and asked me about who the new men were. That is about all.

Q. Did he tell you at any time what his purpose was in asking who the new men were?

Mr. Nicoson: Objected to as leading. [98]

Trial Examiner: I will take it. You may answer.

The Witness: He didn't tell me. It was to get them to come into the union, naturally, or see if they were union members.

Trial Examiner: Is that what he told you or is that what you estimate his purpose was.

The Witness: From his conversation that is what I gathered.

Mr. Nicoson: Object to what he gathered. I don't mind him saying what was said. That is a

(Testimony of Alexander W. Hardy.)

conclusion of the witness and I move to strike it.

Trial Examiner: Well, I will strike it.

Did you ever have any conversation with him about the subject of membership in the union?

The Witness: Yes.

Trial Examiner: During the year 1954?

The Witness: Yes.

Trial Examiner: Go to any one of those conversations and tell us about when it occurred and who was present and what was said.

The Witness: July of 1954, I hired some car unloaders. He came to the yard one Wednesday or Thursday, asked me who the new men were. I told him. He went and talked to the men, came back and said two of them weren't in the union. I asked him if they could get in the union. He said, yes, if they pay [99] their temporary dues, and that is where we left the conversation.

Trial Examiner: Go ahead.

Q. (By Mr. Weil): Do you know what union Mr. Matzko represented?

A. Local 2288. Sawmill Workers.

Q. Pardon me, are you or have you been a member of that union?

A. I have been on the temporary basis.

Trial Examiner: When was that?

The Witness: On and off for the last five years. I'm not required to be a union member but in order to avoid arguments with the union, I hold a temporary card when they require me to.

Trial Examiner: At any time during your mem-

(Testimony of Alexander W. Hardy.)

bership, do you know of your knowledge whether Mr. Matzko occupied any position with the union?

The Witness: He was their accredited union representative.

Trial Examiner: When was the last time that your membership and his position in that regard coincided?

The Witness: I believe it was January of this year.

Trial Examiner: Of 1955?

The Witness: Yes. [100]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Nicoson): Do you know where the union has its office, 2288 has its office?

A. Not now. I'm not sure, used to be at North and Union.

Q. Do you know where it was in 1954?

A. No, I don't.

Q. You were never in the office in 1954?

A. No.

Q. You never saw Mr. Knight doing anything then in the union office in 1954?

A. No.

Q. You never saw Mr. Hermeyer doing anything in the union office in 1954?

A. No.

Q. You say Mr. Matzko is the accredited union representative of Local 2288. What does that mean?

A. He is the representative who comes around, sees that the [103] men are in the union. That the

(Testimony of Alexander W. Hardy.)

union contract is abided by and that the dues are paid.

Q. What does it mean when you say he is the accredited union representative?

Trial Examiner: I think he has just testified to that.

Q. (By Mr. Nicoson): What does the word "accredited" mean?

* * * * *

Trial Examiner: I certainly think it's much more important to determine what this union representative has done rather than the language that this witness has used, but he did use it and I will permit the question.

* * * * *

Trial Examiner: I will take the answer to the question and see how far we get along. If it gets involved in anything, I will know what my obligation here is.

Do you know the definition of the word "accredited"?

The Witness: I can use accredited but I don't know whether I can define it. [104]

* * * * *

Q. (By Mr. Nicoson): Did I understand you to testify that Mr. Matzko was no longer with the union?

A. No longer comes to our yard. We have a new representative.

Q. I see, and you don't know whether Mr. Matzko is any longer in any capacity with this

(Testimony of Alexander W. Hardy.)

union or not? A. Only from hearsay.

Q. Now, do you know as a matter of fact whether Mr. Matzko had any connection with this union in 1954 during the month of November?

A. Yes, I do.

Q. What are the facts that led you to make that statement?

A. Mr. Matzko was calling on us and he had a union paper showing that he was the representative.

Q. He had some sort of a document, did he?

A. Yes.

Q. You do not know then whether or not Mr. Matzko's document [105] had been lifted during the month of November, 1954, do you?

A. No.

Q. You do not know that he had any such document in November of 1954? A. No.

* * * * *

Q. (By Mr. Nicoson): Mr. Hardy, when was it that you saw these papers with Mr. Matzko, you said Mr. Matzko had which showed him being the union representative?

A. I don't recall that I asked him for them over, he showed them once or twice during the four years.

Q. At the beginning of your relationship?

A. Approximately. [106]

* * * * *

Q. (By Mr. McCormick): Do you recall the date of the conversation that you referred to in

(Testimony of Alexander W. Hardy.)

direct testimony between yourself and Mr. Matzko in connection with the discharge of Mr. Tooze?

A. No. [107]

* * * * *

Trial Examiner: On this occasion when Mr. Matzko discussed Mr. Tooze's separation or discharge, did the subject of union membership or the subject of the union come up at all in the conversation? [110]

The Witness: Yes.

Trial Examiner: Who said anything about it?

The Witness: Mr. Matzko.

Trial Examiner: What did he say?

The Witness: Said Mr. Tooze was not a member of 2288. [111]

* * * * *

DON FRANK TOOZE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): What is your full name?

A. Don Frank Tooze.

Q. Your address?

A. 4352 Locustdale, El Monte.

Q. Have you ever been employed by W. B. Jones Lumber Company? A. Yes.

Q. When were you hired?

A. I was hired October 28, 1954.

Q. Who hired you? A. Alex Hardy.

(Testimony of Don Frank Tooze.)

Q. What work did you do there?

A. I was hired as a stacker driver, forklift operator.

Q. When you were hired, was there any mention made of the union? A. None.

Q. After you were hired, when was the union first mentioned to you and by whom?

A. November 3rd, I believe, a union representative came to me during the lunch hour and had a conversation with Alex which I do not know but I saw Alex point to three or four new men and then Matzko—— [114]

Mr. Nicoson: Just a minute, I don't like to interrupt but here I go, he is telling about something he didn't hear. He talked about a union representative which he has not established or not identified. I move to strike his answer as not being responsive, no proper foundation having been laid and hearsay.

Mr. McCormick: I join in that objection on the same grounds.

Trial Examiner: I will reserve ruling for a moment.

The individual you refer to as the union representative, do you know his name?

The Witness: Yes, sir.

Trial Examiner: What is his name?

The Witness: John Matzko.

Trial Examiner: I deny the motion. Continue with your testimony.

The Witness: He came over and before we got

(Testimony of Don Frank Tooze.)

into a conversation, I said to him that I was going in the back yard and he could see me back there, that I had to go back to work and which I did. I was in the back yard operating the—I believe I was operating the stacker. The gentleman come up to me——

Trial Examiner: Which gentleman?

The Witness: Well, the one that, Mr. Matzko.

Trial Examiner: Why don't you tell us Mr. Matzko?

The Witness: Well, he introduced himself, showed me his identification, stating that he was the representative of the [115] Lumber and Saw-mill Workers' Local 2288 and that I said to him, before you, before you start in, there's a little situation I want to explain to him. I told him that I had worked for Pope and Talbot, Oakridge, Oregon.

That I was a member of the local union up there and that I left. I left, that I was involved in charges filed by the union up there and I was tried on charges of aiding and abetting a revolutionary organization which I was found guilty on.

In April of that year, I quit Pope and Talbot and went to Inneman and Poulson which they were a CIO organization who, in turn, they sold out to the Georgia Pacific Company.

Trial Examiner: You are telling all this to Mr. Matzko?

The Witness: Yes.

Trial Examiner: All right, go ahead.

(Testimony of Don Frank Tooze.)

The Witness: That is all my conversation to him.

Trial Examiner: Go ahead.

The Witness: They sold out to Georgia Pacific and I went to work for the Portland Meadows Amultnomah Kennels Club. And that, those were strictly seasonal jobs and then I came down here and started to work.

I even told him the fact I was going to get married at the end of November. We went into a discussion about the charges and he said to me that if what I told him was true that he would have to write a letter to the local union at the Willamette District Council to see just what the situation was [116] and to verify everything I had told him. If it was so, he said, if it was so that he would have to pull me off the job and our voices began to raise at this time and I asked him, "Doesn't the Taft-Hartley Law protect me?"

He says, well, he should know more about the Taft-Hartley Law than I would and I said he ought to.

At which time, the latter part of this conversation, there was a colored boy, name of Bob, worked for the company. He took in the latter part of this conversation and I asked Bob if he thought the union could pull me off the job. He said he was inclined to believe that the union could.

Mr. Matzko said he would write the letters to the respective union or, the Willamette District

(Testimony of Don Frank Tooze.)

Council, and verify what I had told him and that was about the end of our conversation.

Q. (By Mr. Weil): Did you have any further conversation with anyone representing the union?

A. Oh, yes.

Q. When did you next converse with any union representative?

A. I believe it was the following Wednesday. No, no, I took the rest of the afternoon, this particular afternoon off, went directly over to the Regional Director's office of the CIO, Mr. DeSeltzer, explained the entire situation to him just as I did to Mr. Matzko, and he suggested that I go see Mr. Knight and gave me his card as a reference. I called Mr. Knight from Mr. DeSeltzer's office who was not in at that time but would be back [117] between 3:30 and 4:00, something like that. At this particular time some employer was over there and I went over to the union hall of 2288 and saw Mr. Knight.

Q. Was anyone else present when you saw Mr. Knight?

A. I went up there, when I first went in the union hall there, I asked the girl for Mr. Knight and Mr. Knight was there. He come out and we went into his office at this particular time.

Q. Was there anyone else present in his office?

A. Later on, yes.

Q. Not at the beginning of the conversation?

A. No, not at the beginning of the conversation.

(Testimony of Don Frank Tooze.)

Q. Will you tell us, did Mr. Knight introduce himself or did you know who he was?

A. He did not introduce himself other than the girl went and got Mr. Knight and he came out. I introduced myself.

Q. What was the conversation you had in Mr. Knight's office?

Mr. Nicoson: Objected to on the ground it calls for a conclusion of the witness, hearsay as to this respondent, no proper foundation having been laid as to who Knight is.

Trial Examiner: I overrule the objection. You may have to connect it up. I have not made up my mind as yet whether there is enough in the record as to that but I will take the conversation. Go ahead.

The Witness: The conversation in Mr. Knight's office, I showed him Mr. DeSeltzer's card and told him that he advised [118] me to see him and explained who I was and told him exactly the same situation that I told Mr. Matzko and Mr. DeSeltzer about the charges and trials in Oakridge, Oregon and being found guilty on those charges and that from hearsay of what the penalties were to be, that I had never received any official notice of what the penalties were or just what the situation was or even if I was guilty or not.

I told him that I had seen Mr. DeSeltzer. He said he didn't like it, what was my idea of seeing Mr. DeSeltzer when the AFL was the representative of the Jones Mill. I told him that I didn't

(Testimony of Don Frank Tooze.)

trust the AFL's word or the CIO's. I wanted to get the information and I go to various people and get it. He didn't like it and stated it as such.

At that time Mr. Matzko came into the office. We shook hands and I told Mr. Matzko that I was talking to Mr. Knight here about my situation and that a little bit more conversation took place which I just don't remember very much right now.

Mr. Knight told Matzko to give me a work permit for the month of December—no, November, and which next Friday come in and get my work permit and he would see what the situation was by having these letters written up to the local union in Oakridge, Willamette District Council, to Eldon Kraal which was one of the officers up there, find out just what the situation was.

At this time he didn't say whether he would put me off the [119] job or not. As to what I can recall, he did say he would help me out as much as he could and that is about the end of the conversation there.

Q. (By Mr. Weil): Did you have any further conversation with Mr. Knight at any time?

A. Yes.

Q. When did you next have a conversation with him?

A. I believe it was a week after the following Friday. I'm not sure on this now but it was on—

Trial Examiner: Before you get into that, were you working during this period?

The Witness: Yes, I was.

(Testimony of Don Frank Tooze.)

Trial Examiner: Did you have a temporary permit?

The Witness: No.

Trial Examiner: Didn't Mr. Matzko give it to you?

The Witness: No, told me to come in the following Friday to pick up the work permit.

Trial Examiner: Was this the occasion when you had this next conversation?

The Witness: Yes.

Trial Examiner: All right, go ahead.

The Witness: I returned on, I believe it was, a Friday to get the work permit. I went into the union hall and asked the girl for a work permit and she asked me if I was a member of the union. I told her, no, that that was one of the situations [120] I wanted to find out about and she asked me if my name was Tooze. I told her yes. She left and went back to the back office and got Mr. Knight who came out front.

Q. (By Mr. Weil): Was anyone else present besides you and the girl and Mr. Knight?

A. Yes, Mr. Oyster was.

Q. Mr. Oyster, did he go with you?

A. Yes, he did. He went down to the union hall with me.

Q. Tell us what was said.

A. Mr. Knight came out of his office and he said, "We couldn't do much for you, Tooze. You are not a member in good standing."

And then he took out from underneath the table

(Testimony of Don Frank Tooze.)

or whatever you want to call it, counter, a folder of letters and showed me three letters that he had received, one from Eldon Kraal, Willamette District Council, one was a letter written by Purscell, the financial secretary of the local union at Oakridge, and another document that was prepared by the Hearing Board, the Board of the hearing of my trial. I had read all these and offered to pay my dues then.

Trial Examiner: To Mr. Knight?

The Witness: Mr. Knight, yes. They refused. I asked about my work permit. They did not issue me a work permit because I was not a member in good standing.

Trial Examiner: Who said that? [121]

The Witness: Mr. Knight.

Trial Examiner: Mr. Matzko was there at this time?

The Witness: Yes, he was at this time. I offered to join the union over again and Mr. Knight said that I couldn't become a member twice. I asked him why. He never did answer me.

I asked him, "Doesn't the Taft-Hartley Law protect me?"

When I said "Taft-Hartley Law," he wheeled around and walked away and as he was walking away, he said, "Don't talk Taft-Hartley Law to me."

Mr. Oyster then went in back, Mr. Oyster who took in part of this conversation went back and got his work permit and I told him that I would meet

(Testimony of Don Frank Tooze.)

him out in the car and I left and went out in the car.

Q. (By Mr. Weil): During that conversation did Mr. Knight give you any documents?

Trial Examiner: He said—you mean to keep?

Mr. Weil: Yes.

The Witness: Oh, no.

Q. By (Mr. Weil): Did he at any subsequent time? A. Mr. Knight did not, no.

Q. Did Mr. Matzko? A. Yes.

Q. When?

A. Well, Mr. Matzko came to the mill there once, well, it was the day that I was discharged and he drove up in the back yard [122] where I was working at the time. He called me over to him. I went over there and he handed me three documents which were copies of these letters that were on file in the union's office. I read them and handed them back to him and he handed them back to me and told me to keep them that they were mine.

Q. (By Mr. Weil): Do you have those documents with you? A. Yes.

Q. May I see them, please?

Are these the exact documents that he handed you? A. Those are the exact documents.

Trial Examiner: Mr. Weil, do you contend there is any union shop agreement here, lawful or unlawful?

Mr. Weil: I don't contend an unlawful shop agreement here.

(Testimony of Don Frank Tooze.)

Trial Examiner: Any union shop agreement here?

Mr. Weil: I have considered it irrelevant whether there is or is not since the circumstances under which this man was discharged could not have been legalized by any agreement.

Trial Examiner: All right. So what are those documents going to establish?

Mr. Weil: These documents are going to establish, well, in the first place, they were handed, inasmuch as they were handed this witness by a union representative, one of them bears an address to Mr. William H. Knight, B.R., which I believe the Board can and you can take judicial notice as the common abbreviation of business representative, Local 2288, [123] and I think, among other things, these documents establish——

Trial Examiner: The whole point I make is this, if this witness' testimony is credible and found to be the fact, it would be abundantly plain, it seems to me, that he had been discharged for some reason or other than the failure to pay dues. I make that proviso but if you want to try these documents, let's see where we get.

Mr. McCormick: That observation, if the Court please, was made as to the union, not the employer?

Trial Examiner: Well, he wasn't working for the union, you know.

Mr. McCormick: There is no testimony upon which the remark can stand as to the employer, if the Court please.

(Testimony of Don Frank Tooze.)

Trial Examiner: Well, that may be. My principal point here was to try to avoid cluttering the record with documents that probably wouldn't help any side at all or add anything to the case.

Mr. Weil: The documents tend to establish, I believe, the actual reason why the discharge was effectuated. The pleadings do not contain general denials on behalf of the union. I have no idea of the defense.

Trial Examiner: You got testimony *prima facie* as to a proffer of dues and refusal. Go ahead.

Mr. Weil: I have had marked General Counsel's Exhibits 4, 5 and 6 for identification, the documents referred to by the [124] witness in his testimony. General Counsel's 4 purporting to be a copy of a letter dated November 8, 1954; General Counsel's 5, a copy of a document purporting to be a letter of November 12, 1954, both letters addressed to William H. Knight, Business Representative, Local 2288; General Counsel's 6 for identification, a document purporting to be an excerpt from the minutes which is referred to in G. C. 5.

I would like to offer these at this time.

Trial Examiner: Any objection?

Mr. Nicoson: No objection.

Mr. McCormick: No objection.

Trial Examiner: They will be received.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 4, 5 and 6 and were received in evidence.)

[See pages 218-221.]

(Testimony of Don Frank Tooze.)

Q. (By Mr. Weil): Did you have any further conversation at this time with Mr. Matzko?

A. We are still having a conversation at this particular time. He handed me these documents and told me that he's going to have to pull me off the job. I asked him why and if he'd let me work until Friday.

He says, no, he was supposed to pull me off Monday and couldn't make it. He says, "I'm going to have to pull you off the job, going to have to see Jones to pull you off the job."

I says, "I want to see Jones myself." [125]

In which I got on the stacker and drove around to the office and parked the stacker which at the time some of the fellows working were on lunch hours and which Alex also was. I called Alex over to the side and told him that Matzko was pulling me off the job.

Mr. Nicoson: I object to that as being out of the presence of any purported representative of the respondent union on the ground it's hearsay. I move to strike it on that ground.

Q. (By Mr. Weil): Was Mr. Matzko present when you talked to Alex? A. Yes.

Trial Examiner: I deny the motion.

Q. (By Mr. Weil): Proceed.

A. Alex came over. I told him that the union was pulling me off the job. Alex wanted to know why. Matzko told him I was not a member in good standing and that he would have to pull me off the job.

(Testimony of Don Frank Tooze.)

Alex asked him if I couldn't work for the rest of the day.

Matzko said, "No."

Alex figuratively speaking hit the overhead. He was sore. He says, "That is what I like about the God dam unions. You have to pay a man eight hours for four hours pay."

Matzko interrupted him at this time and told Alex you don't have to pay eight, pay me four hours. Alex told me he would give me the full eight hours pay. He said something [126] about over-time which I don't recall.

I believe at this point Matzko told him he was going to have to pull me off the job and Alex said, "O.K."

I believe Matzko left at that point, I'm not sure. He left, anyway.

Trial Examiner: Do you remember the date of that conversation?

The Witness: The 17th.

Trial Examiner: Of what?

The Witness: November.

Trial Examiner: What year?

The Witness: 1954.

Q. (By Mr. Weil): After Matzko left did you continue your conversation with Alex or did you have any further conversation with Alex?

A. Yes, I asked Alex if I could see——

Mr. Nicoson: Objected to on the ground hearsay as to the respondent.

(Testimony of Don Frank Tooze.)

Trial Examiner: I will take it as to the company. Go ahead.

The Witness: I asked Alex if I could see the bookkeeper as I wanted to know the interstate commerce trade of the company. Alex said that the bookkeeper was too busy to find that information out and I believe I left after that. I came directly up to the office here of the National Labor Relations Board. [127]

Q. (By Mr. Weil): Did you have any further conversation with Alex that day?

A. Yes. I left the company, came directly to the National Labor Relations Board here. In which I was interviewed.

Trial Examiner: Don't tell us what happened here.

Mr. Weil, you don't have to go into all the details of this witness' experience here at the Board and so on. Let's hit the spots you feel are necessary.

Mr. Weil: I asked the witness to testify about the further conversation that day with Alex.

Q. (By Mr. Weil): How did you talk to him, in person?

A. No, I called him by phone.

Q. Have you ever spoken to Alex by phone before? A. Yes.

Q. Did you recognize his voice? A. Yes.

Q. What was the conversation you had with him?

(Testimony of Don Frank Tooze.)

Mr. Nicoson: Objected to on the ground hearsay as to this respondent.

Mr. McCormick: I join in that objection, hearsay as to the employer.

Trial Examiner: I will take it as to the company.

The Witness: I asked Alex if Jones had heard about it.

He said, "No."

And I asked Alex how Jones would take it and if I got [128] squared away with the union if I could come back to work.

He says, "Yes, Don," he says, "get something in writing either from the union or from the National Labor Relations Board and come back to work."

And I told Alex that the company could fire me for any infraction of the rules and Alex said, "Don't worry about that. The company is not firing you for anything like that. All we want you to do is get something in writing from either the union or the National Labor Relations Board if you do come back to work."

He wished me good luck and hung up.

Trial Examiner: Who was your boss at that plant?

The Witness: Immediate boss?

Trial Examiner: Well, you can tell me that if you want.

The Witness: Alex was my immediate boss.

Trial Examiner: What did he do to boss you?

The Witness: Gave me various orders to put up.

(Testimony of Don Frank Tooze.)

Trial Examiner: The Alex you have been referring to, is he the preceding witness, the gentleman who testified before you?

The Witness: Yes.

Trial Examiner: Did you have any further conversation at any time with Alex?

The Witness: Yes. The next day I reported to Alex at approximately 8:00 o'clock in the morning, told him that I wasn't dressed for it but I had my working clothes out in the car. [129] Reporting for work.

He asked me if I had anything in writing from the union or the National Labor Relations Board. I told him, no, and that I had a copy of the Taft-Hartley Law in which I'd like to have him read it. I took it out of my coat pocket and laid it in front of him and he refused to see it, the law, at that time.

During this conversation there was a girl working behind the desk there. I don't know her name. I believe she heard part of this conversation. I told Alex that there's a possibility I'd have to file charges against the company to protect my rights.

Trial Examiner: That completes the conversation?

The Witness: That is just about it.

Trial Examiner: All right, go ahead.

Q. (By Mr. Weil): Did you thereafter have any further talk with any representative of the company or of the union?

A. Yes, I had. I believe it was, I went down to

(Testimony of Don Frank Tooze.)

the company's office to pick up my check. I saw Alex at the counter in the office which I believe he notified me that Mr. Moore wanted to see me and Mr. Jones.

Alex, myself and Mr. Moore, we went into Mr. Jones' office. We had a conversation there. The fact, what the trouble was——

Mr. Nicoson: Object to what was said in there on the grounds hearsay as to this respondent.

Trial Examiner: I will take it as to the company. Go ahead. [130]

The Witness: Mr. Jones tried to advise me and find out if I had offered to pay my dues. I told him I had and he thought I was a good worker and he suggested I go back and cash my check and go back down to the union hall and offer to pay my dues again and, or, join the union over again. I told him I would and I have already tried to. We shook hands and wished each other the best of luck and I believe I left at that time. There was probably some other conversation which I don't remember at this time.

Trial Examiner: Do you recollect whether you discussed with Mr. Jones the reason why your dues had not been accepted, was that discussed?

The Witness: As I said that I had explained to Mr. Jones just partially what the circumstances were.

Trial Examiner: Tell about it.

Mr. Nicoson: May my objection go to that, your Honor, as hearsay?

(Testimony of Don Frank Tooze.)

Trial Examiner: Yes, as to the union, you are correct. I'm taking this as going to the company interests only.

The Witness: I told Mr. Jones I was involved in a jurisdiction election between the CIO and AFL in Oakridge, Oregon, and I was a staunch organizer for the CIO at this particular time and after the election was over with that the AFL had won the election and that the charges were filed against me for aiding and abetting a revolutionary organization and I [131] was supposedly found guilty but I never received any notice.

Trial Examiner: By "revolutionary organization," so I may be straight, do you mean dual unionism? Do you mean organizing for another union?

The Witness: What the union means, I don't know.

Trial Examiner: You used the term 'revolutionary organization'?

The Witness: The union used the term, not me.

Trial Examiner: What context was it used in?

The Witness: Contest?

Trial Examiner: Context?

The Witness: The fact that I was trying to swing the local men over to the CIO.

Trial Examiner: All right, I understand now. Go ahead.

Q. (By Mr. Weil): Did you have any further conversations after this with any representative of the union?

A. Yes, when I left Mr. Jones' office, I went in

(Testimony of Don Frank Tooze.)

my car, drove through the yard, went down to the far end of the yard what we referred to as a triangle which triangle——

Q. We won't go into that. Did you go from there down to the union office? A. Yes.

Q. Anybody go with you? A. Mr. Oyster.

Q. Whom did you see at the union office? [132]

A. Mr. Knight.

Q. Anyone else?

A. The girl first and Mr. Knight.

Q. What was the conversation there?

A. I asked the girl if I could see Mr. Knight. She left and came back and said Mr. Knight was indisposed at which time Mr. Knight comes wandering out of his office and I told the girl I had come down here to pay my back dues and she said she couldn't accept them. At this point Mr. Knight came over to the counter.

I told her that I wanted to join the union over again at which time Mr. Knight interposed there and said I couldn't join the union again, that I couldn't become a union member twice. The fact that I was already a member of the union, I couldn't join over again.

I asked him what in the devil he meant by that, that he couldn't show me in the constitution or by-laws anything to that effect.

He says, "Well, take my word for it, you can not join the union over again, you are already a member of the union but you have no withdrawal card.

(Testimony of Don Frank Tooze.)

We can not accept your union dues down here for what you owe another union."

I offered to pay these particular dues and I offered to pay my initiation fee and additional dues and I had the money with me to do so. He absolutely refused to accept the money [133] whatsoever.

Q. Did you have the money in your hand?

A. Yes, I believe I did.

Q. Do you recall anything further of that conversation?

A. He says, well, you should have gotten in touch with me before I filed charges, unfair labor charges against the union. At which time I believe I just ignored him and walked out. I don't remember.

Q. Have you since that time had any conversations with any representatives of the union?

A. AFL, no.

Q. Have you since that time had any conversations with any representative of the company?

A. No, not that I can remember.

* * * * *

Cross Examination

Q. (By Mr. Nicoson): Mr. Tooze, have you ever held membership in 2288?

A. No, I can't say I did. [134]

* * * * *

Q. Now, at the time you were having these conversations with Mr. Knight about the trouble that

(Testimony of Don Frank Tooze.)

you were or had had up north, is it not a fact that you were delinquent in your dues payments?

A. Yes.

Q. You were delinquent for a period of about six months, weren't you, at that time?

A. I don't recall.

Q. Well, you do recall that it was more than three months?

A. Well, from the total amount of dues I owe I guess so, I don't know.

Q. Do you recall when these charges were filed against you up north at Oakridge, Oregon?

A. Do I recall them?

Q. Yes, about the date?

A. No, I don't. I believe it was in, it was in March, I'm not sure, though.

Q. That would be in March of 1954? [135]

A. I believe so, I'm not sure.

Q. Or it wasn't 1953, was it?

A. Well, '54, yes.

Q. After the charges were filed against you, I take it these charges were filed when you were in the Carpenters' local in which you held membership at that time, that is, the charges, we are talking about?

A. Lumber and Sawmill Workers' Union.

Q. All right, what local, 2453?

A. I believe so.

Q. 2453. Then after the charges were filed in November, 1954, you discontinued paying dues into Local 2453 at or about that time, didn't you?

(Testimony of Don Frank Tooze.)

A. I had a credit against my dues.

Q. Yes. But I mean——

A. I didn't pay any more after I left, no.

Q. Is that right, after the charges were filed you never made another payment to 2453?

A. Yes, deducted out of my severance pay.

Q. When was that deduction made?

A. I left in April and I got my last check in April and I noticed on my statement that union dues were withheld.

Q. You were working under a union contract that provided for dues check-off at the time?

A. If we wanted it such.

Trial Examiner: What? [136]

The Witness: I said if we wanted it that way.

Q. (By Mr. Nicoson): When you signed a written authorization permitting the company to take out the dues for you? A. Yes.

Q. So then that was the last dues payment that you made to the union Local 2453, is that right?

A. I believe so. That would put it approximately at the end of April, 1954.

Q. When you left that local or, rather, when you stopped paying dues to that local, did you thereafter pay dues to any other Carpenters' local at any place? A. Not that I recall.

Q. When you were talking with Mr. Knight, you said that you offered to pay him your dues. How much money did you offer to pay?

A. Seventeen and a quarter.

Trial Examiner: It was what?

(Testimony of Don Frank Tooze.)

The Witness: Seventeen and a quarter.

Trial Examiner: \$17.25?

The Witness: Yes.

Q. (By Mr. Nicoson): Did you show the money to Mr. Knight?

A. The first time, no.

Q. At any time?

A. Yes, I had money in my hand.

Q. And you had \$17.25 in your hand? [137]

A. I had far more than that.

Q. Now, this was in November and you offered to pay Mr. Knight \$17.25?

A. For the back union dues.

Q. For back union dues.

Trial Examiner: When you speak of "back union dues," do I understand you mean Local 2453?

The Witness: Right.

Trial Examiner: And your dues in this new organization that is new to you?

The Witness: Yes. I offered to pay these back dues.

Trial Examiner: Yes.

The Witness: Which they refused.

* * * * *

Q. (By Mr. Nicoson): Now, have you ever sent the sum of \$17.25 to Local 2453 in payment of delinquent dues? A. No. [138]

* * * * *

Q. And at that time you had no obligation to pay any dues to Local 2288, did you, that you knew of? A. I couldn't see why I couldn't.

(Testimony of Don Frank Tooze.)

Q. You didn't know of any reason that you should have? A. (No response.)

* * * * *

Q. (By Mr. Nicoson): Did you say anything to Mr. Knight when [145] you proffered \$17.25 that it should be accepted and remitted to 2453?

A. I believe I asked, he said he couldn't accept that. I asked him why he couldn't. Don't know just the exact words or just how it was but I do recall something to that effect.

Q. He said that that would be money of 2453 and that would have to be paid into 2453?

A. That is true. [146]

* * * * *

Q. Now, when you were at the window did you tell Mr. Knight how much money you were prepared to pay? A. I don't believe so.

Q. Did Mr. Knight ask you what you were prepared to pay? A. No. [149]

* * * * *

Q. (By Mr. Nicoson): Now when you were up north and charges were filed against you, those charges were in writing?

A. Typewritten, yes, sir. [151]

Q. Were you notified of a trial? A. Yes.

Q. You came to the trial? A. Yes.

Q. You gave evidence? A. Yes. [152]

* * * * *

ROBERT OYSTER

a witness called by and on behalf of the General

(Testimony of Robert Oyster.)

Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Give us your full name and address.

A. Robert Oyster, home address, 34 Beach Road.

Trial Examiner: Los Angeles?

The Witness: Los Angeles, staying at the Downtown Y.M.C.A.

Q. (By Mr. Weil): Have you ever been employed by the respondent company, W. B. Jones Lumber Company? A. Yes.

Q. When were you first employed there?

A. First of November.

Q. By whom were you employed?

A. Alex Hardy.

Q. In what capacity did you work, do you work there? A. I worked on the cutoff saw.

Q. Are you still employed there? A. No.

Q. Did you come to testify in this hearing voluntarily or were you subpoenaed?

A. I was subpoenaed. [166]

* * * * *

Q. Did you hear Mr. Tooze testify about the conversation at the union office before his discharge at which you were present? A. Yes.

Q. Do you recall that conversation?

A. In the hearing room or do I recall the conversation?

Q. Do you recall the conversation itself?

(Testimony of Robert Oyster.)

A. Parts of it, I was listening.

Q. Will you tell us as nearly as you recall what was said and by whom? A. In here?

Trial Examiner: No, no, go back to the union hall with Mr. Tooze and somebody else and tell us what happened and who was there.

The Witness: I went with Mr. Tooze to pay my union membership card and heard the conversation between Mr. Tooze and Mr. Knight and Mr. Tooze said that he wanted to join the union here if it was possible. And Mr. Knight said that he [167] would not, could not accept his moneys to join the union, that he was, he had some letters from up north that he was *errors* in his dues up north and that he wouldn't be acceptable as a union member here.

Trial Examiner: You mean in arrears?

The Witness: In arrears, did I say errors?

Trial Examiner: Arrears is what you mean?

The Witness: Yes.

Q. (By Mr. Weil): Do you recall any more of that conversation?

A. No, I don't recall anything more.

Trial Examiner: If you don't recall anything more, you really don't have to say anything more.

The Witness: All right, I don't recall anything more.

Q. (By Mr. Weil): Do you recall another conversation at the union office at which Mr. Tooze and Mr. Knight and others spoke at which you were present? A. Yes.

Q. That was after Mr. Tooze's discharge?

(Testimony of Robert Oyster.)

A. Yes.

Q. Do you recall who was present at that conversation?

A. Mr. Tooze, myself, one or two secretaries and Mr. Knight and Mr. Matzko, I don't know the name.

Trial Examiner: We have had a dozen different pronunciations. The reporter will get it correctly.

Q. (By Mr. Weil): Tell us what was said at that conversation [168] as nearly as you can recall.

A. Mr. Tooze offered——

Mr. Nicoson: Just a minute. I object to the conclusion. He may say what Mr. Tooze said, I don't mind that.

Trial Examiner: Tell us what Mr. Tooze said.

The Witness: Mr. Tooze asked Mr. Knight if he could pay the dues that he owed to Mr. Knight and the local, the local union, and Mr. Knight said that he couldn't accept them, could not accept them, or would not accept them, I don't know. He wouldn't accept the moneys.

Don asked him, Mr. Tooze asked him if he could join the union and Mr. Knight said, "No, we can't have you as a member."

Q. (By Mr. Weil): Do you recall any more of that conversation? A. No, no more.

Q. Going back to the first conversation at the time of that conversation at the visit to the union hall, did you get a work permit?

A. Yes, I did.

(Testimony of Robert Oyster.)

Q. Did Mr. Tooze ask for a work permit at that time? A. Yes, he did.

Q. Did he get one if you know?

A. No, he didn't.

Trial Examiner: Can you tell us what was said on the subject?

The Witness: Yes. Mr. Tooze asked if he might have a [169] work permit to carry him through until he could get squared away up north, squared away.

Trial Examiner: Asked whom?

The Witness: Asked Mr. Knight.

Trial Examiner: Did Mr. Knight make a reply?

The Witness: Yes, he said he could not give him a work permit. [170]

* * * * *

Trial Examiner: You stipulate that the union is a labor organization within the meaning of the Act.

One other point is that about these two individuals, about their status. Can that be the subject of a stipulation?

Mr. Nicoson: Why, sure, what do you want to know about it?

Mr. Weil: Mr. Knight was the business representative and Mr. Matzko was a representative with the right to speak for the union in this matter and did.

Mr. Nicoson: Certainly, I will also give you Mr. Matzko's name, if you like, M-a-t-z-k-o.

Trial Examiner: It's a matter of your determination whether you need anything more on that

score. It's a question to accommodate Mr. McCormick whether he wishes to be present when the evidence goes in.

Mr. Weil: If counsel will stipulate that Mr. Matzko's name is M-a-t-z-k-o, and he was, is not now, but was during the entire year 1954 a representative of Local 2288 and——

Mr. Nicoson: I will stipulate this that Matzko was a [172] union representative and, to-wit, an assistant business agent during the month of November, 1954. I will also stipulate that Mr. William H. Knight was senior business agent of Local 2288 during the month of November, 1954.

Trial Examiner: Throughout the month of November, 1954?

Mr. Nicoson: From the 1st to the 30th, inclusive.

Mr. Weil: Will you stipulate they had the authority to take the action which the evidence indicates they took?

Mr. Nicoson: Of course not. [173]

* * * * *

WILLIAM B. JONES

a witness recalled by and on behalf of the Respondent Company, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. McCormick): State your name.

A. W. B. Jones.

Q. Mr. Jones, what was your connection during 1954 with the respondent employer?

(Testimony of William B. Jones.)

A. President of W. B. Jones Lumber Company.

Q. You have heard the testimony of Mr. Tooze referring to a conference or a meeting with Mr. Moore, Mr. Hardy, yourself and Mr. Tooze in your office approximately a week following this separation from employment in your company?

A. I did.

Q. And that date would be fixed about the 24th of November? A. Yes.

Q. Mr. Jones, I show you General Counsel's Exhibits for identification, 4, 5 and 6 and ask you if you have ever seen those papers.

A. I can't identify the papers. Tooze came in my office.

Q. Answer the question. Did you ever see them?

A. I can't identify the papers as being the papers that were put on my desk.

Q. Would you just quickly scan each paper and advise the [176] Court whether you have ever read the contents in each paper on each exhibit?

A. I didn't read that.

Q. You didn't read that, referring to General Counsel's Exhibit 4?

A. No, right. I didn't read that.

Q. Referring to General Counsel's Exhibit 5?

A. I didn't read that.

Q. Referring to General Counsel's Exhibit 6.

Mr. Jones, at that conference did Mr. Tooze advise you as to the reason that Mr. Matzko requested separation from your employment?

A. Mr. Tooze came in the office with Mr. Moore

(Testimony of William B. Jones.)

and Mr. Hardy. Hardy told me previously there was some trouble with the union and one of our men. He was a good man he wanted to keep. He came in the office, he was coming down to get his check. I said, "Bring him in, let's see if we can get it straightened out."

They came in the office. I was introduced to Tooze and he started to tell me a long story about Oakridge and I said, "Let's not go into this big, long story. What's the trouble?"

He had some paper he handed me.

I said, "I don't want to read a lot of papers, I don't have time. Do you owe back dues?"

He said, "Yes, I'm back in my dues." [177]

I said, "Well, we can't fight with the union. You have to go up and pay your dues and square yourself away. We want you back. Alex says you're a good man. We can't get in any controversy with the union."

And either before that time or during that time or after that time I telephoned Knight about it.

Q. Mr. Knight? A. Head of the union.

Q. What was said on that occasion by you and what was said by Mr. Knight?

A. I recall I asked Knight what the trouble with this fellow Tooze was. He was a good man. We needed this lift truck driver. And I said it's only a matter of \$21.00 or so, I remember. The figure, I could be off on the figure that he owes in back dues. He has a paper explaining what he has to do. All

(Testimony of William B. Jones.)

he has to do is pay those back dues and Knight says, yes.

So it must have been before or during the time that I was talking to Tooze because I told Tooze, "All you have to do is go up there and pay back dues. Why argue and fight about it? Go up and pay and go back to work and let's not have to talk."

That was just about the conversation. It took place within four or five minutes.

Trial Examiner: Do you remember whether it was before or after the discharge?

The Witness: After the discharge. He came down to get [178] his check. They are paid on a certain day.

Trial Examiner: I mean your telephone call to Knight.

The Witness: My telephone call to Knight was after the discharge. I think it was the same day that Tooze came in the office, right before or during the time Tooze was there.

I told Tooze, "All you have to do is pay your back dues. I talked to Knight. Get it paid up and go back to work and stop talking."

I didn't read the papers. He started to tell me a big, long story. [179]

* * * * *

WILLIAM G. BRALEY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

(Testimony of William G. Braley.)

Direct Examination

Q. (By Mr. Weil): Will you state your name, please? A. William G. Braley.

Mr. Nicoson: William Brady?

The Witness: B-r-a-l-e-y.

Q. (By Mr. Weil): What is your address?

A. 730 Ardmore Avenue, Los Angeles 29.

Q. By whom are you employed?

A. W. B. Jones Lumber Company, Inc.

Q. What position do you hold with that company? A. Credit manager.

Q. As credit manager of W. B. Jones Lumber Company, what are your duties?

A. I handle all credit and collections for the company, [217] establishing credit and accounts receivable.

Q. In the course of those duties, do you keep records of the sales of your company to your customers? A. Most definitely.

Q. And what other records do you keep?

A. I keep all records on payments or non-payments, amount of sales, continuous records of what has been paid and what has not been paid but which they have charged against the account; what they have bought and so forth.

Q. What is the initial record made of a sale by your company? A. Invoices.

Q. Are the invoices posted to any other record?

A. The invoices are posted to the ledger sheet.

Q. From what record, if any, do you work?

(Testimony of William G. Braley.)

A. Both invoices and ledger sheets, primarily ledger sheets.

Q. You post the invoice to the ledger sheets?

A. I do.

Q. Do you have with you the ledger sheets for the Johnston Pump Company? A. Yes, sir.

Q. Will you get them out, please?

Mr. Nicoson: The Johnston Pump Company?

Mr. Weil: Yes, J-o-h-n-s-t-o-n.

May I see that please?

Trial Examiner: Do you want to show it to counsel, Mr. [218] Weil?

Mr. Weil: Yes, I wish to show it to counsel at this time.

Trial Examiner: All right, Mr. Weil, Mr. Nicoson has finished with it.

Mr. Weil: Thank you.

Mr. Nicoson: Have you had it marked?

Mr. Weil: Will you please mark this as General Counsel's Exhibit No. 7 for identification?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 7 for identification.)

Q. (By Mr. Weil): Handing you what has been marked General Counsel's Exhibit No. 7 for identification, I will ask you if that document shows a record of sales invoiced during the year 1954?

A. Yes, sir.

Q. Are those sales columnized?

A. Yes, sir.

Q. Will you start with the first sale in 1954 and

(Testimony of William G. Braley.)

read down the amounts of each sale, down the column?

Now, prior to that; does that contain all of the sales to the Johnston Pump Company?

A. Yes, these are all charge sales.

Trial Examiner: Do you propose to have him read all of these entries into the record? [219]

Mr. Weil: I propose to have him read all of these entries into the record. I believe this is the quickest way.

Trial Examiner: I wonder if that is necessary? Do you want to discuss it with Mr. Nicoson for a moment?

Mr. Nicoson: May we go off the record.

Trial Examiner: Sure.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Weil: Will counsel stipulate that if asked, Mr. Braley would testify that the total sales of W. B. Jones Lumber Company, Inc., to the Johnston Pump Company, are approximately \$8503.81 for the year 1954?

Mr. Nicoson: I will stipulate to that as revealed by the exhibit, whatever the number is.

Trial Examiner: General Counsel's No. 7 for identification.

Mr. Weil: Yes, No. 7 for identification.

Trial Examiner: Do you propose to enter that?

Mr. Weil: I do not.

Trial Examiner: All right, it is available here if respondent's counsel wants to examine it.

(Testimony of William G. Braley.)

Mr. Weil: I would like to find out that the invoices are also available here.

Trial Examiner: All right, sir.

Q. (By Mr. Weil): Do you have with you the ledger sheet for [220] Stauffer Chemical Company?

A. Yes, sir.

Trial Examiner: I think, unless we encounter some circumstances which warranted a departure from the prior program, you might try to handle it the same way and Mr. Nicoson may go along with you, but that is entirely up to you.

Mr. Nicoson: I think that is a good idea. Have it marked for identification, so that we can follow that and show that we have looked at something.

Trial Examiner: Yes, I think so.

Mr. Weil: I will do so.

Trial Examiner: You can take them individually. Just mark it and why not take it up the same way as you did with the last one.

Mr. Nicoson: You mean mark it General Counsel's Exhibit No. 8?

Mr. Weil: It will be General Counsel's Exhibits Nos. 8 and 8-A.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 8 and 8-A for identification.)

Trial Examiner: I take it you will show these to Mr. Nicoson?

Mr. Weil: As soon as I have identified them all, I will [221] show them to him.

Mr. Weil: This will be marked General Coun-

(Testimony of William G. Braley.)
sel's Exhibit No. 9 for identification, Wolf Range & Manufacturing Company.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

Mr. Weil: I am not writing the words "for identification" on them.

Trial Examiner: All right, the record will show that.

Mr. Weil: Mission Appliance Company——

Mr. Nicoson: That is No. 9?

Mr. Weil: No. 10.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 10 for identification.)

Mr. Weil: No. 11 is the Hammond Manufacturing Company, which has now been marked.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 11 for identification.)

Mr. Weil: No. 12 is the Mississippi Glass Company.

Mr. Nicoson: Mississippi what?

Mr. Weil: Mississippi Glass Company.

Mr. Nicoson: Mississippi Glass Company?

Mr. Weil: Yes, that is No. 12.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 12 for identification.)

Mr. Weil: Southern Heater Corporation, that will be No. [222] 13. There are—strike that.

(Testimony of William G. Braley.)

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 13 for identification.)

Mr. Weil: C. & M. Manufacturing Company——

The Witness: There are three sets on that one.

Mr. Weil: That will be General Counsel's Exhibit No. 14-A and 14-B.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 14-A and 14-B respectively for identification.)

Mr. Weil: The next one is Modern Spring——

Mr. Nicoson: Modern Range?

Mr. Weil: Modern Spring; that will be General Counsel's Exhibit No. 15.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 15 for identification.)

Mr. Weil: Ducommon Metals & Supply Company——

Trial Examiner: What number is that one?

Mr. Weil: That is No. 16.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 16 for identification.)

Mr. Weil: National Supply Company is General Counsel's Exhibit No. 17.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 17 for identification.) [223]

Mr. Weil: And Empire Trailer Company will be General Counsel's Exhibit No. 18.

(Testimony of William G. Braley.)

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 18 for identification.)

Mr. Weil: Kroehler Manufacturing Company, that will be General Counsel's Exhibit No. 19.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 19 for identification.)

Mr. Weil: Columbia Pictures Corporation; that will be No. 20.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 20 for identification.)

Mr. Weil: Chrysler Motors; that will be General Counsel's Exhibit No. 21.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 21 for identification.)

Mr. Weil: Phelps Dodge Copper Products Corporation, that will be No. 22.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 22 for identification.)

Mr. Weil: And Morris D. Kirk & Sons, Inc., that will be No. 23.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 23 for identification.)

Mr. Weil: And Martinolich Consolidated Construction [224] Company——

Mr. Nicoson: Who?

(Testimony of William G. Braley.)

Mr. Weil: M-a-r-t-i-n-o-l-i-c-h Manufacturing Co., that will be No. 24.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 24 for identification.)

Mr. Weil: And Reynolds Electrical & Engineering Company, that will be——

Mr. Nicoson: Donald——

Mr. Weil: Reynolds Electrical & Engineering Company; that will be General Counsel's Exhibit No. 25.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 25 for identification.)

Mr. Weil: Mr. Examiner, as I recall, Mr. Merrill of Sprague Engineering Company testified to that company's purchases. Therefore, I will not put these on record.

Trial Examiner: As it will only take a moment, I do not see any harm in doing it.

Mr. Weil: Well, I haven't added it up yet, so I cannot give you the figures.

Trial Examiner: Well, what exhibit number are you up to now?

Mr. Weil: No. 25.

Trial Examiner: All right, go ahead.

Mr. Weil: May we go off the record? [225]

Trial Examiner: Yes, but before you do, General Counsel's Exhibits Nos. 7 through 25 for identification, what are they, those that you have just heard enumerated?

(Testimony of William G. Braley.)

The Witness: You mean what are they called?

Trial Examiner: Yes. What are they?

The Witness: Ledger sheets.

Trial Examiner: And each exhibit number refers to what?

The Witness: Ledger sheets of a particular account for the year 1954.

Trial Examiner: Have you heard the names as the General Counsel read them over?

The Witness: Yes.

Trial Examiner: And does each exhibit number as he read it correspond to the name of the customer?

The Witness: Yes, sir.

Trial Examiner: Go ahead. Well, you may go off the record.

(Discussion off the record.)

Hearing Officer: On the record.

I take it, gentlemen, that by agreement the stipulation that you entered into before, as to what this witness would testify to, in respect to General Counsel's Exhibit No. 7, you wish stricken from the record?

Mr. Nicoson: That is correct.

Mr. Weil: That is correct. [226]

Trial Examiner: All right, go ahead.

Q. (By Mr. Weil): Mr. Braley, have you had occasion to total the figures on General Counsel's Exhibits Nos. 7 through 25? A. Yes, sir.

Q. Would you give us your total of the figures on General Counsel's Exhibit No. 7 as to sales?

(Testimony of William G. Braley.)

A. Well, all these figures are through one running of the adding machine.

Mr. Nicoson: I am sure I will not check it.

Trial Examiner: Did you use the adding machine?

The Witness: Yes, and made these computations. On General Counsel's Exhibit No. 7 I get a total of \$8,197.70.

Q. (By Mr. Weil): What total do you get on General Counsel's Exhibit No. 8?

A. \$10,019.93.

Q. 83? A. 93.

Q. And on General Counsel's Exhibit No. 8-A?

A. \$200.92.

Q. No. 9? A. \$6,803.33.

Q. No. 10? A. \$14,415.13.

Q. No. 11? [227] A. \$18,662.20.

Q. No. 12? A. \$30,028.40.

Q. No. 13? A. \$8,274.67.

Q. No. 14? A. \$24,755.74.

Q. Yes, that was No. 14-A, and now No. 14-B?

A. \$1,979.20.

Q. No. 15? A. \$11,036.77.

Q. No. 16? A. \$19,705.88.

Q. No. 17? A. \$20,801.55.

Q. No. 18? A. \$17,418.17.

Q. No. 19? A. \$8,735.12.

Q. No. 20? A. \$11,531.97.

Q. No. 21? A. \$8,010.35.

Q. No. 22? A. \$4,192.64. [228]

Q. No. 23? A. \$14,263.83.

(Testimony of William G. Braley.)

Q. No. 24? A. \$26,915.99.

Q. And No. 25? A. \$7,344.72.

Q. Did you total these figures into a grand total? A. I did.

Q. What is that grand total?

A. \$282,943.79.

Mr. Weil: Thank you.

Q. (By Mr. Weil): Calling your attention to General Counsel's Exhibit No. 24 for identification, referring to the Martinolich Construction Company, I will ask you does that ledger sheet show on its face where the materials are shipped?

A. It does.

Q. Where were those materials shipped?

A. Hotel Last Frontier.

Q. In what city? A. Las Vegas.

Q. In what state? A. Nevada.

Q. Calling your attention to General Counsel's Exhibit No. 25 for identification, I will ask you if that ledger sheet [229] shows where the materials were shipped? A. No.

Q. It doesn't?

A. No; it shows that we shipped out of state.

Q. The goods you shipped out of state?

A. Yes, but not to where.

Q. Does it give an address for it, the Reynolds Electrical & Engineering Company? A. Yes.

Q. What address is that?

A. Post Office Box No. 352, Las Vegas, Nevada.

Trial Examiner: Did you make those entries yourself?

(Testimony of William G. Braley.)

The Witness: Yes.

Trial Examiner: And you took your information from what source?

The Witness: From the invoices.

Trial Examiner: And that is both with respect to the Last Frontier address that you gave and this last one?

The Witness: That is correct. [230]

* * * * *

Mr. Weil: Mr. Examiner, during the period of time we were off the record, I discussed with counsel the possibility of stipulating that some, or all of these companies were engaged in commerce to the extent of shipping their products out of state lines in excess of \$50,000.00 annually.

Trial Examiner: Each one \$50,000.00 or——

Mr. Weil: Each one \$50,000.00.

Trial Examiner: Go ahead.

Mr. Weil: Counsel indicated that he would enter into a stipulation that, if called to testify, representatives of the Stauffer Chemical Company, National Supply Company, Columbia Pictures Corporation, Chrysler Corporation and Phelps Dodge Copper Products Corporation, would testify that their respective companies shipped their products out of state of California of a value in excess of \$50,000.00 for each company.

Does counsel so stipulate?

Mr. Nicoson: I will so stipulate. [232]

Trial Examiner: \$50,000.00 for which period?

Mr. Weil: During the calendar year 1954.

Trial Examiner: Is that agreeable to you?

Mr. Nicoson: I accept that stipulation. [233]

* * * * *

GEORGE CROSSMOND FEE

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Garrett: What is your name counsel, please?

Mr. Weil: Paul Weil.

Q. (By Mr. Weil): What is your name?

A. George Crossmond Fee.

Q. And your business address?

A. 3272 East Foothill, California; Johnston Pump Company.

* * * * *

Q. (By Mr. Weil): What was your position with the Johnston Pump Company?

A. Assistant—I am administrative assistant to the general manager of the plant.

Q. What are your duties in that capacity?

A. Many and varied, general supervision or investigation in any department which is beyond the scope of an individual department; review of correspondence, review of daily invoices, [235] review of most of our price literature.

Q. In the course of your duties in the reviewing of invoices, do you review all the invoices for merchandise shipped from that company?

A. Yes, sir. I would say "yes" with possibly

(Testimony of George Crossmond Fee.)

exceptions where the manager calls attention to a particular item—I mean in a certain invoice he might find something that he wished in the group of invoices and it might by-pass me, infrequently.

Q. In the course of your job with these invoices, have you had occasion to note any invoices for shipments outside the State of California by your company?

A. Yes, sir. We make shipments outside the State of California.

Q. When a shipment is made, is there always an invoice made to cover it?

A. We invoice on the day of shipment. That is right.

Q. And does the invoice show for the company's purposes, that a certain shipment was made of a value—of a certain value?

A. Yes, sir.

Q. Does it show to what point that shipment was made?

A. Yes, sir.

Q. Do you have any such invoices with you?

A. Yes, sir, I do. [236]

Q. Do you have any invoices for shipments outside of the State of California?

A. Yes, sir, I do.

Q. May I see them, please?

A. These are shipments of invoices from some of our special buyers whereby a regular record is kept. In other words, not a consumer but a distributor type of individual.

Q. You usually sell through distributors?

(Testimony of George Crossmond Fee.)

A. We sell through distributors and dealers and on occasions, we sell direct.

Q. When you sell to a distributor, does your file contain invoices for each shipment made to that distributor?

A. Yes, sir, on any partial shipment against one of his orders.

Q. Have you had occasion to go over these invoices in the recent past?

A. I have reviewed these recently, yes, sir.

Trial Examiner: Well, just let us get it straight. The witness refers to five binders. All right, go ahead, sir.

Q. (By Mr. Weil): In the course of your reviewing all those, are you able to testify from your review of those, concerning the value of the shipments of your company to states in the Union, other than the State of California?

Mr. Garrett: That calls for a "yes" or "no" answer.

Trial Examiner: Well, he can answer "yes" or "no". [237]

The Witness: Yes, sir.

Q. (By Mr. Weil): What is the approximate value of the shipments out of the State of California? A. Covered by these invoices?

Q. Yes, covered by these invoices you have with you?

Mr. Garrett: Just a minute. I object. The best evidence is the invoices, of what is covered thereon.

Trial Examiner: Well, the invoices are the best

(Testimony of George Crossmond Fee.)

evidence. The question is whether you can lay a foundation for dispensing with their introduction in evidence.

Q. (By Trial Examiner): In whose custody are those invoices kept?

A. In our accounting department.

Q. In your accounting department?

A. Yes, sir.

Q. Had those invoices come to your attention previously as part of your duty?

A. Some of them, yes, sir.

Q. Where did you get these from?

A. From the accounting department.

Q. And in what are they kept in your accounting department?

A. Well, they are kept in our regular file container. For our special buyers, we maintain a manila type folder of all invoices for a given product. These date back to the beginning of what was our fiscal year, prior to a recent change [238] of ownership in our company, which would be the 1st of October.

* * * * *

Q. (By Mr. Weil): Let us follow the course of these invoices from the time they are made out. Who makes them out?

A. They are made out in the accounting department. The basis for the making of the invoices is the sale order, which originates in the sales department.

(Testimony of George Crossmond Fee.)

Q. Are they made out at the time that the shipment is made?

A. Yes, sir, at the time the material leaves the plant, the invoice is prepared.

Q. And then what happens to the invoices after they are made out?

A. They are mailed to the customer.

Q. What happens to the copies that you keep?

A. They are kept as our records and posted to our books. [239]

Trial Examiner: Mr. Weil, if I may interrupt. We have been through so much of this in this proceeding and apparently you do not seem to get what I mean by a foundation here.

There are certain circumstances, under which I will dispense with the need for the introduction of these records, and if that is your purpose, I would suggest you go ahead and lay a foundation, so that that would warrant an exercise of my dismissing them here for the purview of the statute.

Why would it be impracticable to introduce these invoices in evidence. They are here.

Mr. Weil: There are a number of—a large number of them and I was trying to avoid the necessity of marking each individual invoice and having it read.

Trial Examiner: I appreciate that, but if that is your purpose, I cannot take your statement to that effect.

Can you tell us offhand about how many invoices are involved in the folders you have got before you?

(Testimony of George Crossmond Fee.)

The Witness: I would say forty to sixty, sir.

Trial Examiner: Forty to sixty?

The Witness: Yes.

Trial Examiner: Do you know whether any of those are currently in use for any purpose?

The Witness: These are the company's permanent records, yes, sir.

Trial Examiner: Are any of them currently in use for any [240] purpose such as billing?

The Witness: No.

Trial Examiner: Returns, or whatever the case may be?

The Witness: No, sir.

Trial Examiner: Would there be any objection to leaving them here?

The Witness: I would prefer not to, sir.

Trial Examiner: Why would you prefer not to?

The Witness: They are the original documents of the accounting department. Most of the entries have been posted to the books.

Trial Examiner: Are there some that have not been posted?

The Witness: That is possible, yes, sir. I will look at them and determine that. They all appear to have been posted.

Trial Examiner: Well, I notice you looked at one book. Will you take a look at the other books and tell me if any of these have not been posted?

The Witness: That one has not been posted (indicating).

(Testimony of George Crossmond Fee.)

Trial Examiner: Some have not been posted you say?

The Witness: Some appear not to have been posted, yes, sir.

Trial Examiner: Is there any reason why you can't leave those that have been posted? [241]

The Witness: Well, I am not the custodian of these records and I would prefer to contact the custodian before answering that.

Trial Examiner: Do you know whether you would be able to leave them here for a period of say, two or three days?

The Witness: I see no reason why it would be objected to, but there again, I would prefer to ask the actual custodian of the records, sir.

* * * * *

Trial Examiner: Well, just tell us whether you can tell us approximately the value of the shipments, not what the value is, but whether you can tell us, of your own knowledge, what the value was?

The Witness: Yes, sir.

Q. (By Mr. Weil): Will you tell us what the value is?

Mr. Garrett: I make the same objection, your Honor. It is irrelevant, immaterial and incompetent and no proper [242] foundation has been laid. It isn't the best evidence and I object on the basis of the prior objection, which I do not believe has been changed in any way.

The witness has said he isn't the actual custodian of the records. * * * * *

(Testimony of George Crossmond Fee.)

Q. (By Trial Examiner): What is your knowledge based on?

A. A review of all invoices and prior experience. My prior job was actually in the sales department where I did reviewing of invoices from——

Q. Until when was that?

A. That was up until around the 15th of October, sir.

Q. Of 1954? A. Yes, sir. [243]

* * * * *

The Witness: Are you speaking of these particular records or all the records of the company?

Q. (By Mr. Weil): The total sales of the company in 1954, in interstate commerce. In other words, other than the State of California.

Mr. Garrett: Just a moment, your Honor, I think this is going to leave some confusion on the record.

Trial Examiner: I agree. Mr. Weil, I am confused now. You started with the records and went on to something else.

The Witness: I asked if he knew of his own knowledge as to these facts. In his answer, it became apparent that his own knowledge was based on these records.

Trial Examiner: On which records?

Mr. Weil: The total invoices, which he doesn't have here. [245]

* * * * *

Q. (By Mr. Weil): From your personal knowledge of the records you have before you, have you

(Testimony of George Crossmond Fee.)

determined the value of the shipments to the companies who are referred to in those records, during the year 1954?

Trial Examiner: Now, the records before you?

The Witness: I did not review each invoice in this record. I selected these records myself, because I knew these people were principal users of our product, volume users of our product. A brief review of the invoices confirmed what I already knew, that they were volume users.

Mr. Garrett: I ask that the answer go out as not being responsive to the question.

Trial Examiner: Well, I do not conceive it to be prejudicial. I will let it stand. I will deny the motion. I will agree it isn't responsive.

Mr. Weil: May I see the records, please? [246]

Trial Examiner: I think, Mr. Weil, you should identify these by exhibit numbers. I am not suggesting here that I am going to require you to introduce them in evidence, but we ought to know what we are talking about.

Now, he has already referred to five of these folders. Why don't you just mark lightly in pencil in order, "General Counsel's Exhibit No. 26, 27, 28, 29 and 30" for identification?

He has already referred to the folders and he has already identified them, and we will know what we are talking about then.

Now, the respondent's counsel can look through them and you can refer to them on the record, and in certain circumstances, on the basis of answers

(Testimony of George Crossmond Fee.)

that have been given, it may be that it would not be practicable, bearing in mind that this happens to be a completely neutral party, to tie up its records.

I might refer to Section 10 (b) which dispenses with the introduction of the records, providing that the respondent has sufficient opportunity to look through them.

Mr. Garrett: May I be allowed, at this time, your Honor, to see the exhibits?

Mr. Weil: I have marked them as follows:

The records for Ingram Brothers is General Counsel's Exhibit No. 26 for identification; the records for Big T. [247] Pump Company as General Counsel's Exhibit No. 27 for identification;

The records for Gilbert Pump Company, General Counsel's Exhibit No. 28 for identification;

The records for General Machinery Company as General Counsel's Exhibit No. 29 for identification;

And the records for E. W. Henkle, as General Counsel's Exhibit No. 30 for identification.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 26 to 30 inclusive, for identification.)

Mr. Weil: I am handing them to counsel at the same time.

Trial Examiner: Have you totaled up the figures for any of those invoices in those folders?

The Witness: No, sir, I have not.

Trial Examiner: You haven't?

The Witness: No, sir, I haven't added them up.

Mr. Weil: That is what I was looking for, to see

(Testimony of George Crossmond Fee.)

if there were some big invoices in them that——

The Witness: There are some big invoices in there.

Q. (By Mr. Weil): I notice one in here for \$11,000.00; are there any for much over that, do you recall?

A. \$15,000.00 would be as much a shipment as we would make on a single invoice, due to limitations of our shipping [248] facilities.

Trial Examiner: We can go off the record for a few minutes while the respondent counsel looks through them.

Mr. Garrett: I will not be long here, sir.

Trial Examiner: Sure. Go ahead. We will go off the record.

(Discussion off the record.)

Trial Examiner: On the record.

The respondent union's attorney has looked through the folders which have just been identified as General Counsel's Exhibits Nos. 26 to 30.

Q. (By Mr. Weil): Do General Counsel's Exhibits Nos. 26 through 30, contain invoices which reflect shipments in value in excess of \$50,000.00 to your knowledge? A. Yes, sir.

* * * * *

Cross Examination * * * * *

Q. (By Mr. Garrett): Who is the actual custodian of these orders?

A. The custodian of the orders is Mr. Sneider.

Q. What is his position?

A. He is the comptroller. At the time that we

(Testimony of George Crossmond Fee.)

were talking about, he was the assistant treasurer of the Johnston Pump Company.

Q. Back in 1954? A. That is right. [251]

* * * * *

Q. These invoices you have are all reflecting the period of 1954?

A. Yes, sir, or what would be under the old Johnston Pump Company, the first quarter of the fiscal year in 1955. The fiscal year changed with the change of ownership too.

Q. I notice on those invoices that a good many of them show shipments in 1955 rather than 1954.

A. Well, the first of the fiscal year is on the bottom of the pile.

Q. Your estimate of totals is based upon all these invoices?

A. My review was principally for the 1954 period.

Q. Well, these particular records kept by the company, are all of them records of 1954 and 1955?

A. I did not understand that.

Q. The invoices involved in each one of these folders, covers the year 1955 and 1954 at the same time; is that correct? [252]

A. That is right.

Q. And it is your testimony that in totalling the 1954 figures exclusively, it is in excess of \$50,000.00; is that correct?

A. Yes, sir. [253]

* * * * *

ROBERT H. LANCASTER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Will you give us your full name, please? A. Robert H. Lancaster.

Q. And your address? [255]

A. Home address?

Q. Business address?

A. 5731 South Alameda Street, that is care of Wolf Range Manufacturing Company.

* * * * *

Q. (By Mr. Weil): What is your position with Wolf Range Manufacturing Company?

A. Office manager.

Q. What are your duties as office manager?

A. Well, inasmuch as we have a small office staff, it doesn't require too much supervision. I work mainly on the credits, not only the credits memorandum but the credit financial standing of our dealers. That, in particular, is my main duty. I have also charge of the accounts payable.

Q. What staff do you have working for you?

A. Well, there is one gentleman handling the ledgers, accounts receivable and general ledger.

We have two girls, one is Mrs. Forman. She is a combination billing clerk, telephone operator and filing. And the other, Mrs. Nichols, she takes care of writing up the orders received from the dealers.

(Testimony of Robert H. Lancaster.)

Q. Do these people work under your supervision and direction? [256]

A. Not completely under my supervision. For instance, Mrs. Nichols comes in under the sales department. Mrs. Forman, telephone and the billing, comes under my supervision.

Q. What records are kept by your company showing their sales? A. Showing our sales?

Q. Yes.

A. We have a sales journal, which is an analysis of each sale, whether it is a cash sale or on open account. We have very few cash sales, by the way.

Q. Is that the primary record?

A. Well, that is the primary record — the primary record comes from the invoice files, a copy of each invoice is the charge made to dealers.

Then that is recorded in the company's journal and from there it is posted to the various accounts receivable and to the general ledgers.

Q. Who prepares the invoices?

A. Who prepares the invoices?

Q. Yes. A. Is that the price and so forth?

Q. Yes.

A. Mrs. Forman and they are checked by myself.

Q. Checked against what? [257]

A. Well, as to the correctness of the price and the extensions.

Q. Who posts those to the invoice journal?

A. To the invoice journal?

Q. Yes. A. A Mr. Danielson.

(Testimony of Robert H. Lancaster.)

Q. Does Mr. Danielson work under your direction and supervision?

A. Well, yes, more or less. Eventually he is going to succeed me there. We work really on a par. While I have been the office manager for Wolf Range since the time I entered their employment in 1936, Mr. Danielson has entered the invoices in the sales journal and the receivable ledger.

Q. Have you prepared a summary from the accounts showing your sales to dealers or jobbers in other states than California?

A. No, I have not, other than the record we have from our sales tax reports to the State of California.

Q. Do you have that record with you?

A. I do.

Q. May I see it, please?

A. I could have brought the sales journal which shows a column for sales made to the State of California and other states, but that is quite a book and I thought this might suffice. [258]

Trial Examiner: Show these to counsel here, Mr. Weil.

Q. (By Trial Examiner): What kind of a book is that? Why do you say "it is quite a book"?

A. It is a book about that width and that thickness (indicating.)

Trial Examiner: The witness indicates about four inches in thickness. And length?

The Witness: I would say about that thick (indicating).

(Testimony of Robert H. Lancaster.)

Trial Examiner: About three inches in thickness and about eighteen inches to two feet long.

Is that correct?

The Witness: Yes. It so happens that this book I speak of has the checks drawn and the sales entries.

Q. (By Trial Examiner): About how many pages has that book, do you know?

A. Oh, let us say, I would judge one hundred and fifty pages roughly. I fill about twelve, thirteen or fifteen pages per month.

Q. Is that book in current use?

A. Not for last year.

Q. The one for last year isn't in current use?

A. No.

Q. Do you have occasion to refer to it at all in recent days? A. Yes, sir. [259]

Q. For what purposes?

A. Well, different entries that might come in from dealers.

Q. That is what I meant when I asked you if it was in current use. A. Oh.

Q. Have you any occasion to use it currently?

A. Yes, but it is hard to say because I might use it two or three times a day and might not use it again for another week.

Q. When was the last time you used it?

A. I think it was last week, possibly.

Trial Examiner: All right, go ahead.

The Witness: I could have brought that book if I had thought it was absolutely necessary, but if

(Testimony of Robert H. Lancaster.)

you wish to know how much of our sales to out of state customers, this is the total for the year (indicating).

Trial Examiner: The witness has indicated an adding machine tabulation.

Q. (By Mr. Weil): How are these sales tax records made up?

A. This is for the first quarter of the year. This is the sales tax report that we rendered to the State of California like all business concerns covering collection in taxes.

And the one side here, for example, is sales for the year to out of state customers. That represents the total charges, for that period, October 1st to December 31st on [260] dealers that we have out of the State of California.

Trial Examiner: 1954, is that sir?

The Witness: Yes.

Trial Examiner: Go ahead, sir.

Q. (By Mr. Weil): Who makes up this record?

A. Mr. Danielson makes this at the present time. I used to make it up.

Q. When did you used to make it up?

A. Two years ago.

Q. Is this record kept in the regular course of your company's business? A. Oh, yes.

Q. From what records are these made up?

A. From the sales register and the invoice file. When I speak of the "invoice file", that is the file containing copies of all invoices in numerical order for the business.

(Testimony of Robert H. Lancaster.)

Q. In other words, that is copies of the original invoices then? A. Yes.

Q. Are those carbon copies? A. Yes.

Q. What is done with these records after they are made up by Mr. Danielson?

A. I don't understand your question. We keep, of course, the copy. This is a copy of the report that goes to the State [261] of California and this typewritten tabulation covers the sales that are taxable.

We, being manufacturers, there are very few sales we have that are taxable because we distribute through dealers and the tax is charged and collected by the dealers, but if we do have a restaurant owner who wants some parts for one of our pieces of equipment, we sell it to him at the retail price and collect the taxes.

Trial Examiner: Thank you. Suppose you proceed to another point.

Q. (By Mr. Weil): Have you made a summary of what the records for the year 1954—strike that, please.

Are those rendered quarterly?

A. Yes.

Mr. Garrett: Is that the sales tax you are talking about?

The Witness: Yes.

Mr. Weil: Yes, the sales tax returns.

Q. (By Mr. Weil): Are the sales tax returns on a calendar quarterly basis? A. Yes.

Q. Would there be four for the year of 1954?

(Testimony of Robert H. Lancaster.)

A. Yes.

Q. Have you totalled the figures shown on those forms for the year 1954 for your sales outside of the State of California?

A. Yes, I have and to substantiate—— [262]

* * * * *

Mr. Garrett: Objected to as irrelevant, immaterial and incompetent and as being hearsay. The witness already testified that the reports were made out by another gentleman. There has been no showing that he has any familiarity with this total or whether he knows if it is correct or not.

Trial Examiner: I do not know why the company's journal isn't here or the sales journal, whichever it is. The witness said he could have brought it. I would let him testify from that on the foundation that has been laid. [263]

* * * * *

Trial Examiner: No, you are just expected to answer questions when they are asked you.

I have had difficulty with your foundation since the very moment this hearing opened and frankly, I cannot blind myself to the fact that you have a witness sitting before you, who has before him a rather large and bulky folder containing apparently copies of these reports, of which he has spoken.

You have not asked the witness a single question along the line that might go to substantiate or establish that these reports are records kept in the usual course of business. [264] * * * * *

(Testimony of Robert H. Lancaster.)

Q. (By Mr. Weil): Looking at General Counsel's Exhibit No. 31 for identification, what does this file contain?

A. That contains a report to the State of California for the Board of Equalization and these forms here (indicating) to Walter C. Peterson, City Clerk, for sales tax, applicable to the City of Los Angeles.

Trial Examiner: All right, sir.

Ask him another question.

Q. (By Mr. Weil): Does the file contain any other documents?

A. No, and if you are covering 1954——

Trial Examiner: Just answer the question, sir.

The Witness: It contains no other documents.

Q. (By Mr. Weil): For what purpose are the documents in this file made up?

A. This file consists of duplicate copies of tax reports rendered to the State of California.

Trial Examiner: Now, how far back?

The Witness: This goes back to the inception of the tax, I guess.

Trial Examiner: Can you tell us, by looking at the file?

The Witness: Yes, sir. This first return was for the period of January 1, 1936, to March 31, 1936.

Trial Examiner: And how do they go chronologically? [266]

The Witness: Would you mind explaining your question? Do you mean have there been any filed since that time?

(Testimony of Robert H. Lancaster.)

Trial Examiner: No. Have there been any reports filed since the first report?

The Witness: Oh, yes, the originals of all these duplicate copies.

Trial Examiner: Who started that file?

The Witness: I did.

Trial Examiner: And until about two years ago who maintained it?

The Witness: I did.

Trial Examiner: And who made up the reports until about two years ago?

The Witness: Myself.

Trial Examiner: And who has been doing it since then?

The Witness: Mr. Danielson since one year ago. In the month of May and prior to that, it was a gentleman named Sol Blue.

Trial Examiner: And under whose supervision did these two people work?

The Witness: Myself.

Trial Examiner: In whose custody is that file, General Counsel's Exhibit No. 31 for identification; who has custody of it?

The Witness: I have it and Mr. Danielson has it. It is [267] kept in the safe. Mr. Danielson has the combination of the safe and I do myself likewise.

Trial Examiner: This has been in your custody since 1936, has it?

The Witness: Yes.

(Testimony of Robert H. Lancaster.)

Trial Examiner: All right. Now, you can ask him for what purpose he keeps it.

Q. (By Mr. Weil): For what purpose do you keep this file?

A. Keep this duplicate copies of the reports rendered?

Q. Yes.

A. To assist the auditors of the State Board of Equalization who make an audit about every two to three years and there has never been any audit for the City of Los Angeles, because I think they work together.

Q. Is it required that your company have these figures available for those auditors?

A. Oh, yes. It so states on this form that it is the copy to be retained by the company. [268]

* * * * *

Q. (By Mr. Weil): Is there a document in here for each quarter since 1936?

A. That is correct.

Q. Referring to the document for the first quarter of the year 1954, I will ask you does that document show the sales, in interstate commerce to out of State consumers?

A. No, because we do not sell direct to a consumer. We sell through a dealer and jobber. Who the consumer may be, we don't know, but it is without question sold in interstate commerce.

Mr. Garrett: Just a moment.

Trial Examiner: I will strike the statement referring to interstate commerce. [269]

(Testimony of Robert H. Lancaster.)

Q. (By Mr. Weil): Does that record contain a complete record of sales in interstate and foreign commerce to out of state consumers?

A. You mean does the State ask us the question?

Q. Yes. A. Yes.

Q. Is there an entry on that form after that question? A. Yes.

Q. What is that now?

A. In this case it is \$55,729.61; that is for one to three months' period.

Q. Does that amount indicate the amount of sales in interstate or foreign commerce to out of state consumers? A. Yes, it does.

Mr. Garrett: Just a minute. Could I have that question again?

(Question read.)

Q. (By Mr. Weil): Didn't you state that you did not sell directly to consumers?

A. That is correct. Locally, if a user of our equipment requires some parts, then they are sold to the consumer.

Q. To whom were these sales made?

A. They would be to jobbers or dealers.

Q. To any particular jobbers or dealers?

A. Any particular classification. [270]

Q. Yes.

A. Well, they would be restaurant and hotel supply—

Q. No, to purchasers—to jobbers or dealers

(Testimony of Robert H. Lancaster.)

within the State of California or outside the State of California.

A. Outside the State of California.

Q. Does that file indicate that \$55,729.61 worth of sales were made to jobbers outside of the State of California? A. That is right.

* * * * *

Cross Examination * * * * *

Q. (By Mr. Garrett): Now, do you have with you in your possession here in this hearing room, the invoices upon which the 1955 figure was based?

A. No.

Trial Examiner: 1954 figure.

Mr. Garrett: Yes, I am sorry.

The Witness: No, that is covered by the book that I had reference to the sales journal and to support the sales journal, I should have the copies of the invoices.

Q. (By Mr. Garrett): Where are the copies of the invoices? A. At the present time?

Q. Yes. A. Down in my office. [273]

* * * * *

Trial Examiner: Does the sales journal show where it was shipped?

The Witness: No, the sales journal would not, but I could produce the files containing the invoice copies.

Trial Examiner: Well, are the figures that are entered in the report to the State, those are compiled from what?

(Testimony of Robert H. Lancaster.)

The Witness: From the sales journal and it is audited every two to three years.

Trial Examiner: Well, how can you tell from the sales journal whether something has been shipped to an out of State——

The Witness: Not during all that period and I cannot say offhand how far back, possibly better than a year—this sales journal carries two columns on the extreme left and one [274] is for invoices out of State and the other is for those in the State of California. [275]

* * * * *

ORIC O. RUTLIDGE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Will you give us your full name, please?

A. Oric O. Rutledge. [277]

Q. And your address?

A. 5342 Glasgow Court, Los Angeles, 45.

Q. What is your profession, Mr. Rutledge?

A. I am credit manager for the Mission Appliance Corporation.

Q. Where is that located at?

A. 12611 South Crenshaw Boulevard.

(Testimony of Orie O. Rutledge.)

Trial Examiner: Excuse me, do you have a stipulation as to that?

Mr. Weil: No, sir.

Trial Examiner: All right. Let us go off the record a moment.

(Discussion off the record.)

Trial Examiner: On the record. Go ahead.

Q. (By Mr. Weil): As credit manager, what are your duties, Mr. Rutledge?

A. I pass on correspondence and supervise the accounts receivable, shipping and collection.

Q. What is the original record made of merchandise that is shipped from your company?

A. The sales order and the sales order invoices.

Mr. Garrett: Counsel, I wonder if, in this one, to save some time, I happen to be familiar with this company, would you object to him, off the record, showing me what he has?

Mr. Weil: I have no objection whatsoever.

Mr. Garrett: Shall we go off the record? [278]

Trial Examiner: Sure. I think it is a very good thing.

We will go off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Weil: I propose a stipulation that Mission Appliance Corporation is a California corporation which has shipped in the year 1954, its products, in excess of \$50,000.00 outside of the State of California from points within the State of California.

Mr. Garrett: Could I have that stipulation read again, please?

(Record read.)

Mr. Garrett: So stipulated. [279]

* * * * *

ROY C. FREDERICKSON

a witness, called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): What is your full name, sir? A. Roy C. Frederickson.

Q. And your address?

A. 770 East Washington Street, Apartment No. 15, Pasadena.

Q. By whom are you employed?

A. Hammond Manufacturing Company.

Q. And what is your position there?

A. Chief accountant.

Q. As a chief accountant, what are your duties?

A. To prepare the financial statements and supervise the office, as far as the accounting function goes.

Q. When your company makes sales, what record is made of such sales, if you know?

A. A sales journal, individual invoices are kept.

Q. By whom is the sales journal kept?

A. Mrs. Kathie Rau. [280]

Q. Is Mrs. Rau employed under your management? A. Yes, she is.

(Testimony of Roy C. Frederickson.)

Q. Do you directly supervise her work?

A. That is right.

Q. What record is made from those records, if any?

A. Those records in the summary are posted to the general ledger and sales tax returns and a break-down as to royalties and other reports are obtained from the sales journal.

Q. Have you prepared a summary of the sales during the year of 1954 for your company?

A. I have prepared financial statements from those sales and I do have the sales tax returns.

Q. They were prepared from that sales journal?

A. Yes.

Q. Who prepares the sales tax returns?

A. I do.

Q. Are they prepared entirely from your sales journal? A. Yes.

Q. Do the sales tax returns show where the merchandise is shipped, if it is shipped? A. Yes.

Q. Do you have any of these sales tax returns with you? A. Yes.

Q. May I see them?

A. This would be the one for the fourth quarter. [281]

Mr. Garrett: Can I see this just a moment?

Mr. Weil: I will mark that lightly as General Counsel's Exhibit No. 32 for identification.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 32 for identification.)

(Testimony of Roy C. Frederickson.)

Mr. Weil: I have marked the document shown me by the witness, as General Counsel's Exhibit No. 32 for identification.

Q. (By Mr. Weil): Showing you General Counsel's Exhibit No. 32 for identification, I will ask you what that is?

A. That is the California sales tax return for the fourth quarter of 1954.

Q. Is that return prepared each quarter?

A. That is right.

Q. And what is done with the original return?

A. It is sent to the state.

Q. For what purpose?

A. In order to say that the sales tax has been deducted.

Mr. Garrett: I am not going to object to the document, counsel. Why don't you ask him how much it is?

Q. (By Mr. Weil): Will you tell us how much that document shows? A. \$444,325.45.

Trial Examiner: And that represents the value of the goods shipped to out of state customers by your concern? [282]

The Witness: That is right. There would also be additional out of state sales to the United States Government.

Trial Examiner: And is that included?

The Witness: No.

Trial Examiner: That is a separate figure?

The Witness: Yes. [283]

RICHARD SMITH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): What is your name and address, please?

A. Richard Smith, 616 West Ash, in Fullarton.

Mr. Garrett: 616?

The Witness: Yes.

Q. (By Mr. Weil): By whom are you employed?

A. The Mississippi Glass Company.

Q. And what is your occupation there?

A. Office manager.

Q. Is that a corporation? A. Yes.

Q. In what state is it incorporated?

A. In New York.

Q. What is the business of the Mississippi Glass Company?

A. Manufacturing of rough rolled and figured glass.

Q. Where is that business carried out?

A. In Fullarton.

Q. What is the address of the plant there?

A. Reymer Avenue. It actually has no number, but it is in [290] the 1700 block.

Q. As office manager, what are your duties?

A. The supervision and carrying out of orders for my superior and also keeping records and data.

(Testimony of Richard Smith.)

Q. What original records are kept of shipments made by your company?

A. We keep records of all shipments by invoices.

Q. Who keeps these records?

A. We do, in the office.

Q. I mean, what person in the office makes up the invoices?

A. We have a billing clerk for that.

Q. Is that clerk under your direct supervision?

A. Yes, she is.

Q. What is done with the invoices after she makes them up?

A. They are kept on file numerically, by the month.

Q. How big a file is that?

A. It approximately takes the full drawer space in the filing cabinet.

Q. Are those files in daily use?

A. Yes, they are.

Q. Have you prepared a summary from those files? A. I have.

Q. Do you have it with you? A. Yes.

Q. May I see it, please? [291]

Mr. Weil: I will have this marked for identification as General Counsel's Exhibit No. 33.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 33 for identification.)

Mr. Weil: Let the record show that I have been handed this by the witness and it has been marked

(Testimony of Richard Smith.)

General Counsel's Exhibit No. 33 for identification and I have shown it to counsel.

Q. (By Mr. Weil): Did you prepare that document yourself? A. Yes, sir.

Q. How did you go about preparing that document?

A. From invoices. At the end of every month we make up a similar summary like this in respect to that and I took it from that summary of each month.

Q. Is that summary made every month?

A. Every month.

Q. What is the purpose of that summary?

A. The home office is in St. Louis and they require a summary of this nature every month.

Q. Would it be possible, if counsel wished to check the original invoices from which this was made up, that they could do so? A. Yes.

Trial Examiner: You have no objection, I take it?

The Witness: No objection. [292]

Q. (By Mr. Weil): Will you tell me the total of the sums of the invoices? A. \$324,015.68.

Q. What does that sum stand for?

A. That is the shipments of our products from our plant to out of state customers.

Q. To the customers whose names are listed on that summary? A. I don't understand.

Q. The shipments to the customers whose names are listed on that summary? A. Yes.

Q. At the place at which they are listed?

(Testimony of Richard Smith.)

A. Yes.

Q. Referring to the column headed, "Total Sales"; is that the sales to each customer?

A. That is right.

Q. As listed? A. As listed.

Mr. Weil: I would like to offer General Counsel's Exhibit No. 33 for identification. Is there any objection?

Mr. Garrett: I have no objection to his identifying it, but I have to its introduction into evidence. I object as it is irrelevant, immaterial and incompetent and it isn't the best evidence.

Trial Examiner: I will exclude it. His evidence is in [293] as to the amount.

Mr. Weil: I have no further questions.

Trial Examiner: Go ahead.

Cross Examination

Q. (By Mr. Garrett): Mr. Smith, how long have you been with the Mississippi Glass Company?

A. Since 1947.

Q. And have you held various positions during that period of time? A. Yes.

Q. How long have you been in the job that you now hold? A. Approximately three years.

Q. And during that period of time, you have had occasion to have supervision over the accounts receivable department, have you?

A. That is right.

Q. And when you ship something out, you send an invoice and eventually the payment comes in

(Testimony of Richard Smith.)

and that is recorded in your books; is that correct?

A. Yes.

Q. Are the invoices kept by company or how are they kept?

A. Accounts receivable are kept by company. Our invoices are kept numerically.

Q. All invoices for 1954 would be from number such and such to another number? [294]

A. Yes.

Q. How many invoices do you have?

A. Approximately three thousand.

Q. For the year 1954? A. Yes.

Q. Those are in a file cabinet down at your plant? A. Yes.

Q. Were you asked to bring those today?

A. I was asked to bring a summary. I would not want to carry them.

Trial Examiner: Why not?

The Witness: It is heavy, sir.

Q. (By Mr. Garrett): The summary was made by you particularly for this hearing, is that right?

A. Yes.

Q. This summary isn't a summary that is kept in the ordinary course of business; it was prepared for the purpose of this hearing; is that right?

A. Well, no, we have the same summary as this on our file in our office.

Q. And what is that kept for?

A. For being sent to the home office.

Q. Why didn't you bring that one?

(Testimony of Richard Smith.)

A. That is for our carbon copy in the office, and we keep it there. [295]

Q. Well, is that in a report or a letter?

A. It is in a report.

Q. Well, why didn't you bring that in instead of bringing that report in?

A. I did not want to disturb our files, because our files are in use all the time. [296]

* * * * *

Q. Has your company any relationship with the Mississippi Glass Company? A. Yes.

Q. In fact, you sold that item to yourselves, is that right? A. Yes.

Q. It is some sort of a bookkeeping arrangement?

A. We do not bill the Pittsburgh Plate Glass Company at all; we bill the Mississippi Glass Company. [297]

* * * * *

Trial Examiner: Would you leave that please?

Put this in the rejected exhibit file. That has been excluded.

(Thereupon the document heretofore marked General Counsel's Exhibit No. 33 was rejected.)

[See page 222.]

Mr. Weil: I will call Mrs. Fierke.

CAPITOLA FIERKE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

(Testimony of Capitola Fierke.)

Direct Examination

Q. (By Mr. Weil): Will you give us your name and address, please?

A. Capitola Fierke, 1958 Horley Avenue, Downey.

Mr. Garrett: I did not get the name of the street.

The Witness: Horley Avenue, H-o-r-l-e-y.

Q. (By Mr. Weil): By whom are you employed? [300]

A. Southern Heater Corporation.

Q. And what is your occupation there?

A. I am office manager.

Mr. Garrett: Southern Heater Corporation?

The Witness: Yes.

Q. (By Mr. Weil): Is Southern Heater Corporation a corporation? A. Yes.

Q. In what state is it incorporated, if you know?

A. California.

Q. Where is the Southern Heater Corporation plant located?

A. 133 East Palmer Avenue, Compton.

Q. What is the business of the Southern Heater Corporation?

A. They manufacture water heaters.

Q. What are your duties in connection with your position?

A. Well, to keep the books, to keep a record of all the accounts receivable and accounts payable and

(Testimony of Capitola Fierke.)

general ledger. We have other help, but I mean, those are the duties.

Q. Have you any other help under your direct supervision and direction?

A. Some of them, yes.

Trial Examiner: All the office help?

The Witness: Yes.

Trial Examiner: And that would include what types of people? [301]

The Witness: Bookkeepers, stenographers, telephone girls.

Trial Examiner: All right.

Q. (By Mr. Weil): What records are kept by your company of its shipments?

A. Shipments—we have Bills of Lading and invoices.

Q. Who makes up the invoices?

A. Right now a lady by the name of Jean Hayworth.

Q. How long has she been making them up?

A. Since last November.

Q. Who made them up prior to that?

A. Mrs. Ruth Sherman.

Q. Now were Jean Hayworth and Ruth Sherman working under your supervision and direction?

A. Yes.

Q. In doing that work?

A. Yes.

Trial Examiner: Does anybody review their work?

The Witness: There are many, many checks on the work.

(Testimony of Capitola Fierke.)

Trial Examiner: Do you make any?

The Witness: Yes and we have accountants too.

Trial Examiner: Is that your function, to make any check of their work?

The Witness: Well, I am very familiar with what is going on. It is part of my job or at least, I do that. I go around and see what people are doing. [302]

Trial Examiner: Particularly the bookkeepers, do you check what they are doing?

The Witness: Yes.

Trial Examiner: How often do you do that?

The Witness: Daily, every day.

Trial Examiner: All right, go ahead.

Q. (By Mr. Weil): What happens after the invoices are made out?

A. What is done with them then?

Q. Yes.

A. They are filed until they are shipped. The Bill of Lading goes out to the shipping clerk and then the customers are billed.

Q. The Bills of Lading and the invoices are matched up? A. Yes.

Q. What is done with them physically?

A. One copy goes to the customer and one copy stays in one file as an office record of accounts receivable and the other stays in as a numerical record.

There is another record which stays in, which is just a running file for the customers.

(Testimony of Capitola Fierke.)

Q. How many copies of the invoice itself are there in your office of each invoice?

A. When we start out, we have nine copies and three copies are Bills of Lading and one is, more or less, an extra copy or a shop order, and the others go to salesmen for commission. [303]

Two copies go to the customer and the other copies stay in our files, one way or another.

Q. Are they placed in an invoice file of any type?

A. Well, we have one file which is a monthly file and we have another file. It is customers' business and it is properly from one year to the next. And then we have a numerical file, which is just for a numerical record, if we need it.

Q. Have you brought any invoices with you?

A. No, it is very bulky and it is very difficult to bring very much of it. One month would be two books like that and if I brought twelve months, I would have had to have two men and a boy and a truck, I think.

Trial Examiner: The witness has indicated a width of between fifteen to eighteen inches.

Go ahead.

Q. (By Mr. Weil): Did you make a summary of the information? A. Yes.

Q. From the invoice file? A. Yes.

Q. Do you have that with you? A. Yes.

Trial Examiner: Well, how many invoices would one of these books contain; do you know offhand?

(Testimony of Capitola Fierke.)

The Witness: No, I do not. I would say probably seven [304] hundred or something like that. One of the reasons why it is so bulky is that we put everything on the back of the invoice, the customer's order, the Bill of Lading and everything that pertains to it and it is quite bulky.

Trial Examiner: Do you have any occasion to use the invoices for the year 1954?

The Witness: Oh, yes.

Trial Examiner: For what purposes do you use them?

The Witness: We use them all the time for many purposes.

Trial Examiner: Well, would you give some?

The Witness: If we are collecting on accounts, if we are doing statistical work, when we measure today's business against last year's business. We are constantly referring to the previous year's business.

It is one of our references that we use at all times.

Trial Examiner: Could you conveniently conduct your business if those invoices were taken out of the office and brought down here?

The Witness: Not very well.

Trial Examiner: Go ahead.

Mr. Weil: May I see it, please?

Let the record show that the witness handed me a piece of paper which I have marked as General Counsel's Exhibit No. 34 for identification. [305]

(Thereupon the document above referred to

(Testimony of Capitola Fierke.)

was marked General Counsel's Exhibit No. 34 for identification.)

Mr. Weil: I am now showing General Counsel's Exhibit No. 34 for identification to counsel.

Trial Examiner: While we are at it, would you have any objection if any party to this proceeding went to your place and consulted and checked the invoices for 1954?

The Witness: No, I don't think so.

Trial Examiner: That is, to check on the accuracy of any figures you have given?

The Witness: No, that would be all right.

Trial Examiner: I didn't get your last answer, Madam.

The Witness: It would be all right.

Trial Examiner: Thank you.

Q. (By Mr. Weil): Did you prepare that summary yourself?

A. No, a lady by the name of Mrs. Lewis prepared it but she did it when I asked her to and I know which records she used and that she is a very accurate girl.

Q. Did you tell Mrs. Lewis how to prepare it?

A. Yes.

Q. Did you check any of the figures that she used?

A. Yes, a little check, but not much. Just a little sample, to see they were all right. I did not do it actually until I received your letter and I saw that you wanted me to, so then I did check

(Testimony of Capitola Fierke.)

some of the figures to be sure that they were accurate. [306]

Q. From what records did she prepare that?

A. From the customer's files. These invoices that we have been talking about.

Q. As a result of that check, did you arrive at a figure or does the summary which you have, contain a figure for the state sales of your company, out of the State of California, during the year 1954?

A. Yes, each of the states.

Q. Is that arranged by states? A. Yes.

Q. What is the total figure?

A. Including California, the total is——

Trial Examiner: Excluding California.

The Witness: Well, I have California here. I will have to calculate it then. That would be \$1,799,875.00.

Trial Examiner: That excludes shipments within the State of California?

The Witness: Yes.

Trial Examiner: "excludes" was the term.

The Witness: excludes.

Trial Examiner: Yes. That is for 1954, Madam?

The Witness: That is right. [307]

* * * * *

Cross Examination

Q. (By Mr. Garrett): Mrs. Fierke, does the Southern Heater Corporation have one or more than one manufacturing site in Southern California? A. It has one.

(Testimony of Capitola Fierke.)

Q. And everything that you produce is made at this same plant? A. Yes.

Q. I take it that by looking at that adding machine tape there, you have no idea what it exactly represents, other than the fact that you believe them to be a summary of the invoices in your files; is that correct?

A. Well, they can be checked with other figures that we have in our files.

Q. In other words, the only way you could give us a breakdown and say how much material or the value of the material, sent to the State of North Dakota in the year 1954, for example, would be to go back and review the invoices?

A. Yes, sir. I know certain states that we do, more or less, the volume of business but I could not tell you to the last cent. Is that what you mean?

* * * * *

HARRY McCULLY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): Will you give us your name and address, please?

A. Harry McCully.

Mr. Garrett: What is your first name?

The Witness: Harry.

Q. (By Mr. Weil): And your address, please?

A. 707 Taper Street, Compton.

(Testimony of Harry McCully.)

Q. Are you connected with the C. & M. Manufacturing Company? A. Yes.

Q. Were you during 1954? A. Yes.

Q. In what capacity during 1954?

A. President of the corporation.

Q. What did the C. & M. Manufacturing Company manufacture in 1954? [310]

A. House trailers.

Q. Is that company a corporation?

A. Yes.

Q. Where is it incorporated?

A. In the State of California.

Q. As president of the company, what were your duties?

A. I was plant manager and general manager of the operation.

Q. As president of the company, did you have any knowledge of the shipments of your product outside the State of California? A. Yes.

Q. Where did you get such knowledge?

A. Well, from receiving orders and shipping units at the time of completion.

Q. Did you, yourself, receive orders?

A. Yes.

Q. Did you make sales yourself? A. Yes.

Q. Where, other than in the State of California, were your trailers sold?

A. Primarily the eleven western states; Oregon, Washington, Montana, Idaho, Colorado, and so on.

Q. How were they sold?

A. What do you mean?

(Testimony of Harry McCully.)

Q. Were they sold by you individually? Or, were they sold by jobbers? [311]

A. They were sold through the company, partly me individually, and partly by our sales manager, and if any one went in there, whoever was there would take the order.

Q. Apart from any knowledge you may have had by keeping company records, do you have any knowledge of the volume of sales of your company, outside of the State of California in 1954?

A. Outside the state?

Q. Yes.

A. Approximately—outside of the State of California?

Q. Yes.

A. Approximately fifty per cent of our business is outside, and we did approximately \$1,300,000.00 in 1954.

Trial Examiner: That is approximately half of \$1,300,000.00 of your sales in 1954 was the total outside the State of California?

The Witness: Yes.

* * * * *

Cross Examination * * * * *

Q. (By Mr. Garrett): And when you sell a trailer, or a shipment of trailers to a dealer, you invoice it and you have a record of that at your plant? A. Yes.

Q. Were you asked to bring those invoices with you today?

A. No, I don't think so. If I were, I did not

(Testimony of Harry McCully.)

bring them. Any way, we have a trustee up there?

Q. Is that a court trustee?

A. Yes, but they are open for anybody that would like to see them.

Q. Let us take the year, 1954. Where are those invoices kept? A. In our plant.

Q. In a filing cabinet?

A. In the sales file. [313]

* * * * *

Q. There is likely to be available in your office actual figures showing your sales outside the State of California for the year 1954; is that correct?

A. I don't know.

Trial Examiner: The question is whether there is likely to be figures; you can answer that "yes" or "no" if you know.

The Witness: Personally, I don't know. [315]

Q. (By Mr. Garrett): Who at your plant would have charge of your accounting?

A. Well, the girl that does the company book-keeping has the plant figures.

Q. What is the girl's name?

A. Katherine Garrett.

Q. Katherine what? A. Garrett.

Q. G-a-r-r-e-t-t? A. Yes.

Q. And she would be likely to have in her records the actual documents from which it could be ascertained the actual sales out of the State of California for 1954?

A. Yes, she would have the invoices. [316]

* * * * *

JOSEPH L. LEE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): What is your name, please?

A. Joseph L. Lee.

Q. And your address?

A. 931 West Sixty-sixth Street. [327]

Q. By whom are you employed?

A. Ducommon Metals & Supply Company.

Q. What is your occupation?

A. Assistant auditor.

Mr. Garrett: Just a moment. I am familiar with this plant and maybe we can shorten the testimony in this case—may we go off the record for a minute?

Hearing Officer: Off the record.

(Discussion off the record.)

Hearing Officer: On the record.

Mr. Weil: I shall now ask the witness a question.

Q. (By Mr. Weil): Does Ducommon Metals & Supply Company ship its products of a value in excess of \$50,000.00 annually to places in states, other than the State of California from the State of California? A. Yes.

Mr. Weil: That is all.

Trial Examiner: I understand that the respondent counsel isn't objecting to these questions, that he is satisfied with the witness' testimony?

(Testimony of Joseph L. Lee.)

Mr. Garrett: I would like, however, to have the witness' name over again.

The Witness: Joseph Lee.

Cross Examination

Q. (By Mr. Garrett): What is your position with the company? [328]

Trial Examiner: I simply want to put this question to crystalize the matter.

Q. (By Trial Examiner): For the year 1954, what was the dollar value of shipments outside of the state of California from California?

A. The total, I don't know. To our Arizona division it was \$624,886.16, and to the Utah territory, it was \$292,504.71.

Trial Examiner: I take it, Mr. Garrett, you had no objection to these questions?

Mr. Garrett: No. [329]

* * * * *

ROBERT MORSE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Weil): What is your name and address, sir? A. Robert Morse.

Q. By whom are you employed?

A. I am employed by Morris D. Kirk & Sons.

Q. What is your occupation?

A. Treasurer.

(Testimony of Robert Morse.)

Q. Is that a corporation? A. Yes.

Q. In what state is it incorporated?

A. Nevada.

Q. Where is the principal office of Morris D. Kirk & Sons, Mr. Morse?

A. South Indiana Street, Los Angeles.

Q. What does the company do? [330]

A. Non-ferrous smelting for smelters and refineries.

Q. What are your duties as treasurer?

A. Financial accounting, personnel administration.

Q. Do you keep records yourself?

A. Yes, I do.

Q. What records do you keep?

A. Various and sundry costs, statistical and financial records.

Q. Do you have people working under you that keep records? A. Yes.

Q. Do you keep invoice records? A. I do.

Q. Who keeps those records? Or, who makes them up? A. Who makes them up?

Q. Yes.

A. The billing department is the original office.

Q. Is the billing department under your supervision and direction? A. That is correct.

Q. Are the invoices, the original record of shipments made by your company?

A. That is correct.

Q. Does your company ship any materials outside the State of California? A. Yes. [331]

(Testimony of Robert Morse.)

Q. To what states do you ship goods?

A. All of the eleven western states and Alaska and Hawaii, and the Philippine Islands.

Q. Do you have any invoices with you?

A. Yes, I do.

Q. May I see them, please? A. Yes.

Mr. Weil: May the record show that the witness has handed me a group of sixteen invoices which are clipped together with a piece of tape, all of which I will mark for identification as General Counsel's Exhibit No. 35.

(Thereupon the documents above referred to were marked General Counsel's Exhibit No. 35 for identification.)

Mr. Garrett: May I see them a moment, counsel?

Mr. Weil: Surely.

Q. (By Mr. Weil): Do those invoices cover all of the shipments of your company? A. No.

Q. Did you select those invoices yourself?

A. Yes, I did.

Q. What was the basis of your selection of these eight invoices?

A. Out of state shipments to the extent that I needed, \$50,000.00.

Q. Have you totalled those invoices? [332]

A. Yes, as indicated by the adding machine tape.

Q. Did you run that tape yourself?

A. No, I did not.

(Testimony of Robert Morse.)

Q. Who did run it?

A. My stenographer, secretary.

Q. Did your secretary do that under your supervision? A. Yes.

Q. And your direction? A. Yes.

Q. Have you checked the figures on that adding machine tape? A. No, I haven't.

Q. Would you do so at this time?

Mr. Garrett: Oh, I will stipulate that the adding machine correctly totalled the figures.

What is the total?

The Witness: \$52,719.72. [333]

* * * * *

Trial Examiner: I have taken the position, if it isn't clear that, in connection with these witnesses who have testified as to figures, if it is brought to my attention that the respondent union has any difficulty in verifying any of the information from the records, I would entertain a motion to strike all of the testimony that has been given in connection with the figures.

I have said that before and I will repeat it now. I have taken the position that it would be impracticable to load up this proceeding with all of the records that have been referred to throughout and I have been reasonably satisfied that with these neutral parties, the records will be available to any of the parties for any check they wish to make. [342]

* * * * *

Trial Examiner: I suppose when it comes down

to, from your standpoint, the question of dollars and cents whether you have, or not, established within the Board's criteria the dollar value of out of state shipments by various concerns proceeding on the assumption you have established, that the respondent company has made \$200,000.00 worth of sales to concerns; they have in turn, sold goods or services totalling at least \$50,000.00 each, outside the State of California.

Mr. Weil: That is correct, and the reason I do not feel [343] it necessary to press for the attendance of that witness, is that the sales which I believe I have proved of the company total \$280,000.00; that that witness would testify about \$17,000.00 of sales, and I think that is reasonably sufficient. [344]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 3

Sprague Engineering Corporation
1144 W. 135th Street
Gardena, California

W. B. Jones Lumber Co., Inc.
Purchases 1-1-54 to 12-31-54

Raw Material	Gross Purchases	Less Cartage	Less Sales Tax	Net Purchases
Stock	\$5,839.70	(\$176.75)	(\$4.52)	\$5,658.43
Job #1108				
U.S. Airforces	562.19	(38.84)		523.35
Job #1127				
Boeing Air- plane	144.13	(5.25)		138.88
Job #1203-04				
Boeing Air- plane	2,693.77	(83.50)		2,610.27
Job #1229				
Douglas- Torrance	55.25	(5.25)		50.00
Job #1294				
Boeing Air- plane	90.45	(2.25)		88.20
	<hr/>			
	\$9,385.49	(\$311.84)	(\$4.52)	\$9,069.13
	Recap of Purchases			
Interstate	\$3,490.54	(\$129.84)		\$3,360.70
Questionable	5,839.70	(176.75)	(\$4.52)	5,658.43
Local	55.25	(5.25)		50.00
	<hr/>			
	\$9,385.49	(\$311.84)	(\$4.52)	\$9,069.13

GENERAL COUNSEL'S EXHIBIT No. 4

(Copy)

Letterhead of

Willamette Valley District Council
Lumber and Sawmill Workers
Eugene, Oregon

November 8, 1954

Mr. Wm. H. Knight, Business Representative
Local No. 2288
7323 South San Pedro St.
Los Angeles 3, California

Dear Sir and Brother:

Your recent letter referring to the Union standing of Don F. Tooze has been received. The summary of the case of Don F. Tooze is as follows: Early last year the IWA-CIO made an attempt to raid our Local Union 2453 Oakridge, Oregon. During that attempted raid Don Tooze on behalf of the dual union attempted to secure members for the CIO. Other members of the Local 2453 presented written charges against Don Tooze in this matter and he was duly tried and convicted as charged by a trial committee of Willamette Valley District Council.

His penalty was a matter of being placed on probation for a certain period of time. Under this probation he was required to keep himself in good standing and was denied the right to hold any office or vote on any Union business during his probation

period. Immediately after this happened he left the employment of the company at Oakridge which was Pope & Talbot, Inc. and as far as we know in this office he paid no more dues. Therefore, if this be true, he himself violated his probation.

As I am leaving for the General Convention I do not have time to check with the Local at Oakridge as to Tooze's financial standing, therefore I suggest you contact G. M. Purscell, Fin. Sec., Box #22, Oakridge, Oregon in this matter. If Tooze has allowed himself to be suspended for non-payment of dues he then stands perpetually suspended from the United Brotherhood under terms of his probation. About all I can say further is that while Tooze worked at Oakridge he was a perpetual trouble maker so far as our organization is concerned.

With best wishes and kindest regards I am,

Fraternally yours,
/s/ ELDON KRAAL,
Executive Secretary

GENERAL COUNSEL'S EXHIBIT No. 5

United Brotherhood of Carpenters and Joiners
of America

Union No. 2453

Oakridge, Oregon

November 12, 1954

Mr. Wm. H. Knight, B. R.

Local Union 2288

Los Angeles, Calif.

Dear Sir and Brother:

In answer to your letter of November 10, 1954 regarding Don F. Tooze.

Our monthly dues are \$3.25. He has a credit of \$2.25 against his June dues. Therefore, he was in arrears August 31, 1954 and will be suspended for non payment of dues at the end of this month (November). It will take \$17.25 to get him in good standing.

For your information I am enclosing a copy of the minutes of the Executive Committee meeting including recommendation of Trial Committee and the action taken. I would like to have these minutes back.

Hoping I have been of some assistance.

Fraternally yours,

G. M. PURSCCELL,

Fin. Sec.

GENERAL COUNSEL'S EXHIBIT No. 6

Minutes

Minutes of the Executive Committee meeting of

Willamette Valley District Council held in Eugene, Oregon, April 7, 1954.

Trial Committee Chairman, Ted Prusia reported on the trial of member Don Tooze which was held March 13, 1954. He also read the recommendation of the Trial Committee as follows:

“From the date hereof it is the recommendation of the Trial Committee that Don Tooze

Be Placed on probation for a period of three (3) years; denied the right to hold office or be on any Committee relative to the Union.

And for the first year and one half of that time be not allowed to attend Union meetings or have voice or vote on any Union business. He must pay dues regularly and remain in good standing. He will not be eligible for a withdrawal card or clearance card for a period of three years.

Violation of any of these terms calls for full punishment; namely, forever debarred from membership and all rights and benefits of the United Brotherhood of Carpenters and Joiners of America.”

March 13, 1954

/s/ MYRON C. TERPENING

/s/ TED PRUSIA

/s/ R. A. PITKIN

/s/ W. L. BULMER

/s/ C. A. HOSMAN

M/S/C/ To concur in the recommendation.

Respectfully submitted,

ELDON KRAAL,

Executive Secretary

GENERAL COUNSEL'S EXHIBIT No. 33
[Rejected]

Summary of Sales to Out of State Customers—19..

Customer		Total Sales
W. P. Fuller & Co.	Billings, Mont.	\$ 1,408.47
	Boise, Idaho	2,950.49
	Butte, Mont.	5,558.22
	Idaho Falls, Idaho	2,785.21
	Missoula, Mont.	1,384.37
	Ogden, Utah	2,730.93
	Phoenix, Ariz.	17,756.65
	Portland, Ore.	47,743.61
	Salt Lake City, Utah	37,378.48
	Seattle, Wash.	61,266.90
	Spokane, Wash.	8,058.65
	Tacoma, Wash.	11,898.19
	Walla Walla, Wash.	2,476.14
	Yakima, Wash.	4,628.06
Arizona Sash Door & Glass Co.	Phoenix, Ariz.	6,732.98
Arizona Sash Door & Glass Co.	Tucson, Ariz.	1,082.90
Belknap Glass Co.	Seattle, Wash.	27,597.82
Bennett's	Salt Lake City, Utah	8,626.56
Fitzgibbon Glass Co.	Portland, Ore.	14,571.29
Lewers & Cooke	Honolulu, Hawaii	22,780.56
Minnoch Glass Co.	Ogden, Utah	3,022.62
Southwestern Sash & Door Co.	Phoenix, Ariz.	2,141.09
Southwestern Sash & Door Co.	Tucson, Ariz.	1,297.65
Mississippi Glass Co.	St. Louis, Mo.	28,137.84
	TOTAL	<u>\$324,015.68</u>

CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the 21st Region in the matter of: W. B. Jones Lumber Company, Inc., etc. and Don F. Tooze, An Individual, Case No. 21-CA-2116, etc., Los Angeles, California, May 9, 10, 25, 26 and 27, 1955, were had as therein appears, and that this is the original transcript for the files of the Board.

Acme Reporting Company,
Official Reporters

/s/ By Edith Young,
Field Reporter

No. 15172

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

W. B. JONES LUMBER COMPANY, INC., AND LUMBER
AND SAWMILL WORKERS' UNION, LOCAL 2288, AFL,
RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

THEOPHIL C. KAMMHOLZ,

General Counsel,

STEPHEN LEONARD,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

FREDERICK U. REEL,

MAURICE ALEXANDRE,

Attorneys,

National Labor Relations Board.

FILED

DEC 17 1956

PAUL P. O'BRIEN, CLERK

INDEX

	Page
Jurisdiction-----	1
Statement of the case-----	2
I. The Board's findings of fact and conclusions of law-----	2
A. The Board's findings and conclusions concerning the business of the Company-----	2
B. The Board's findings and conclusions concerning re- spondents' unfair labor practices-----	3
II. The Board's order-----	6
Argument-----	6
I. The Board properly asserted jurisdiction over the Company--	6
II. Substantial evidence supports the Board's finding that the Company violated Section 8 (a) (3) and (1) by discrim- inating against Tooze, and that the Union violated Section 8 (b) (2) and (1) (A) of the Act by causing the Company to do so-----	12
Conclusion-----	14
Appendix A-----	15
Appendix B-----	20

AUTHORITIES CITED

Cases:

<i>Connecticut Importing Co. v. Frankfort Distilleries</i> , 101 F. 2d 79 (C. A. 2)-----	9
<i>Jonesboro Grain Drying Cooperative</i> , 110 N. L. R. B. 481-----	3, 7
<i>Local Union No. 12 v. N. L. R. B.</i> , 189 F. 2d 1 (C. A. 7), certiorari denied, 342 U. S. 868-----	7
<i>N. L. R. B. v. Air Associates, Inc.</i> , 121 F. 2d 586 (C. A. 2)-----	12
<i>N. L. R. B. v. Cantrall</i> , 201 F. 2d 853 (C. A. 9), certiorari denied, 345 U. S. 996-----	9, 12
<i>N. L. R. B. v. Bryan Mfg. Co.</i> , 196 F. 2d 477 (C. A. 7)-----	11
<i>N. L. R. B. v. Eclipse Lumber Co.</i> , 199 F. 2d 684 (C. A. 9)-----	11
<i>N. L. R. B. v. Ed Friedrich, Inc.</i> , 116 F. 2d 888 (C. A. 5)-----	12
<i>N. L. R. B. v. Haddock Engineers</i> , 215 F. 2d 734 (C. A. 9)-----	7
<i>N. L. R. B. v. International Ass'n of Machinists, Local 504</i> , 203 F. 2d 173 (C. A. 9)-----	13
<i>N. L. R. B. v. Stoller</i> , 207 F. 2d 305 (C. A. 9), certiorari denied, 347 U. S. 919-----	6, 7
<i>N. L. R. B. v. Thomas Drayage & Rigging Co., Inc.</i> , 206 F. 2d 857 (C. A. 9)-----	12

Cases—Continued

	Page
<i>Olin Industries, Inc.</i> , v. <i>N. L. R. B.</i> , 192 F. 2d 799 (C. A. 5), certiorari denied, 343 U. S. 919-----	12
<i>Pallma v. Fox</i> , 182 F. 2d 895 (C. A. 2)-----	9
<i>Radio Officers' Union v. N. L. R. B.</i> , 347 U. S. 17-----	12
<i>Stephens v. United States</i> , 41 F. 2d 440 (C. A. 9)-----	9
<i>Union Starch & Refining Co. v. N. L. R. B.</i> , 186 F. 2d 1008 (C. A. 7), certiorari denied, 342 U. S. 815-----	12
<i>United States v. Mortimer</i> , 118 F. 2d 166 (C. A. 2)-----	9

Statute:

Administrative Procedure Act (60 Stat. 241, 5 U. S. C., Sec. 1006 (b)), Section 7 (b)-----	11
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Sec. 151 et seq.) :	
Section 8 (a) (1)-----	5, 12
Section 8 (a) (3)-----	5, 12
Section 8 (b) (1) (A)-----	5, 12
Section 8 (b) (2)-----	5, 12
Section 10-----	2
Section 10 (e)-----	2

Miscellaneous:

N. L. R. B. Rules and Regulations (29 C. F. R. 102.35)-----	11
Rules of Civil Procedure for District Courts, Rule 61-----	12

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15172

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

W. B. JONES LUMBER COMPANY, INC., AND LUMBER
AND SAWMILL WORKERS' UNION, LOCAL 2288, AFL,
RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition (R. 77)¹ of the National Labor Relations Board pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*)² for enforcement of its order issued against respondent Lumber and Sawmill Workers' Union, Local 2288, on October 14, 1955, following the usual proceedings under Sec-

¹ References to portions of the printed record are designated "R." References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

² Relevant portions of the Act appear in Appendix B, pp. 20-24, *infra*.

tion 10 of the Act.³ The Board's decision and order (R. 67) are reported in 114 N. L. R. B. 415. This Court has jurisdiction of the proceeding under Section 10 (e) of the Act, the unfair labor practice (the discharge of an employee for non-membership in a union) having occurred in Los Angeles, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law

A. The Board's findings and conclusions concerning the business of the Company

W. B. Jones Lumber Company, Inc. (hereafter called the Company), a California corporation, operates a lumber yard in Los Angeles, California, where it is engaged in the business of selling lumber at wholesale and retail (R. 12; 96). In 1954, the Company sold and shipped products valued at \$34,260.71 from California to customers located in the State of Nevada (R. 13; 153, 163). During the same year, the Company also sold and delivered products valued at more than \$200,000 to a number of customers in California, each of which sold and shipped goods valued in excess of \$50,000 from points within the State of California to places in other states (R. 13-17; 101-107, 154-165, 165-176, 177-187, 190-191, 191-193, 200-206, 208-209, 211-212, 212-215, 217, 222, 4, 6-9).

³ The Board's order is also directed to W. B. Jones Lumber Company. The Board herewith withdraws its request for enforcement of the Order against the Company which has indicated its readiness to comply with the Order.

Upon these facts, the Board found that the Company's operations affect commerce within the meaning of the Act, that they satisfy the Board's jurisdictional standards set forth in *Jonesboro Grain Drying Cooperative*, 110 N. L. R. B. 481,⁴ and hence that the assertion of jurisdiction will effectuate the policies of the Act (R. 68, n. 1, 17).

B. The Board's findings and conclusions concerning respondents' unfair labor practices

Don F. Tooze, the discharged employee involved in the proceeding, was hired by the Company on October 28, 1954 (R. 19; 120). On November 3, John Matzko, a representative of respondent Union (R. 19; 149), having learned of Tooze's employment,⁵ approached Tooze and introduced himself as the Union's representative (R. 20; 121-122). Tooze immediately informed Matzko that before he left his former job a union which he had joined had found him guilty of engaging in dual unionism. Matzko thereupon advised Tooze that he intended to verify Tooze's story and that if true, "he would have to pull [Tooze] off the job" (R. 20; 123). Later that day, Tooze went to the Union's offices and, after repeating the events

⁴ These standards are discussed in the Argument, at pp. 6-7, *infra*.

⁵ Company President William Jones testified that the Company has dealt with the Union in the sense that it has been satisfied to "go along" with the provisions of the contract negotiated between the Union and five lumber yards known as the "big five" (R. 18; 97), and that Union Representative Matzko has customarily visited the Company yard once a week to discuss new employees and those who had failed to pay union dues (R. 19-20; 115-117).

relating to his former union membership, was told by the Union's senior business agent, Knight, to return the following Friday to obtain a work permit for November (R. 20; 124-126). When Tooze, accompanied by Employee Robert Oyster, returned several days later, Knight refused to issue a work permit to him because he was "not a member in good standing" (R. 20-21; 126-127). Knight also showed Tooze several letters, received from officials of his former union, advising that Tooze had been placed on probation because of dual unionism, that Tooze was "a perpetual trouble maker," and that he was in arrears in his union dues (R. 21; 127-128).⁶ Tooze thereupon offered to pay his arrears to Knight and to rejoin the union, but Knight rejected the offer (R. 21-22; 128, 145-148). Unlike Tooze, Oyster was given a work permit (*ibid.*).

On November 17, 1954, Matzko advised Tooze that he was "going to have to pull [him] off the job" (R. 22; 129-132). Matzko then informed Yard Superintendent Alexander Hardy that "Tooze was not a member of [Local] 2288" and that he would have to "pull [him] off the job" (R. 22; 119-120, 132-133). When Matzko added that the Union would "put a picket line around the yard" if Tooze were not discharged, Hardy reluctantly agreed to let Tooze go

⁶ One letter was from Local 2453, United Brotherhood of Carpenters and Joiners of America, to which Tooze had belonged (R. 220); the other two were from the Willamette Valley District Council of the Lumber and Sawmill Workers, chartered by the above-mentioned Carpenters Union (R. 218, 220).

(R. 22; 111-114; 134-135). On the following day, Tooze reported for work, but Hardy refused to accept his services without "anything in writing from the union or the National Labor Relations Board" (R. 23; 136). When Tooze subsequently returned for his check, Company President Jones expressed the opinion that Tooze was "a good worker," and urged him to pay whatever dues he owed and to "square" himself with the Union (R. 23; 136-137, 150-152). Tooze agreed to follow Jones' suggestion and immediately proceeded to the Union's offices. He there offered to pay "back dues" and to pay initiation fees and dues in order to join the Union; but Business Agent Knight replied that the Union could not accept dues owed to "another union," and rejected the offer to join respondent Union (R. 24-25; 138-140).

On the basis of these undisputed facts, the Board unanimously found that the Union denied membership to Tooze, refused to issue a work permit to him, and caused the Company to discharge him. The Board further found that the Company discharged Tooze because he was not a member of the Union. Accordingly, the Board concluded that since the Company and the Union had not executed a valid union-security agreement requiring union membership as a condition of employment, the Union's conduct violated Sections 8 (b) (1) (A) and 8 (b) (2), and the Company's conduct violated Section 8 (a) (1) and (3) of the Act (R. 68, 25-32).

II. The Board's order

The Board's order (R. 69-73) requires the Union and the Company to cease and desist from the unfair labor practices found, and from any other unlawful infringement on the statutory rights of the Company's employees. Affirmatively, the order requires the Union to request the Company to reinstate Tooze, requires the Company to reinstate Tooze, and requires the respondents jointly and severally to make Tooze whole for any loss of pay he may have suffered by reason of the discrimination against him. Finally, the order requires the posting of appropriate notices.

ARGUMENT

I. The Board properly asserted jurisdiction over the Company

The evidence (*supra*, p. 2) establishes that in 1954, the Company shipped over \$30,000 worth of material from California to Nevada. This, without more, would establish that its operations are subject to the National Labor Relations Act. *N. L. R. B. v. Stoller*, 207 F. 2d 305, 307 (C. A. 9), certiorari denied, 347 U. S. 919. Before the Board, the Company did not question the Board's jurisdiction. The respondent Union, however, contended that the Board should not assert the jurisdiction which it possesses, because under the Board's self-limiting jurisdictional standards the Company's business did not have sufficient impact upon commerce to warrant the Board's exercise of its powers. Assuming, *arguendo*, that this issue

is reviewable before the courts,⁷ we submit that the evidence establishes that the Company's operations satisfied the Board's jurisdictional standard.

In *Jonesboro Grain Drying Cooperative*, 110 N. L. R. B. 481, 484, the Board announced that it would assert jurisdiction over an enterprise which annually furnishes goods valued at \$200,000 or more to concerns which in turn annually ship goods valued in excess of \$50,000 to places outside the state. The Board found (R. 68, n. 1, 12-17), and the evidence shows (*supra*, p. 2), that the Company here met this jurisdictional standard. The Union, however, challenged the competency of the evidence showing the interstate sales made in 1954 by several of the Company's customers, asserting that the Company's business with the remaining customers did not meet the \$200,000 minimum standard referred to above. The Union's challenge was based upon two contentions, both of which are without merit.

1. Relying upon this Court's decision in *N. L. R. B. v. Haddock-Engineers Ltd.*, 215 F. 2d 734, the Union contended that such evidence was hearsay because adduced by witnesses who testified from summaries of

⁷ But see this Court's observation in *Stoller*, *supra*, 207 F. 2d at 307, that "where the Board has jurisdiction, * * * whether such jurisdiction should be exercised is for the Board, not the courts, to determine." See also *Local Union No. 12 v. N. L. R. B.*, 189 F. 2d 1, 5 (C. A. 7), certiorari denied, 342 U. S. 868, where the Board dismissed a complaint issued pursuant to a union's charge, holding that the amount of commerce affected failed to meet the Board's jurisdictional standards, and the court of appeals, sustaining the Board, held that the union "has no legally cognizable right in any particular Board jurisdictional policy."

sales records or sales tax returns which they had not personally prepared, and because they either failed to produce such customers' original books at the hearing or to release into the Union's custody those books which were produced. The record shows, however, that the challenged evidence was adduced by responsible employees of the Company's customers, and that they testified, both on direct and cross examination, either from personal knowledge or from sales summaries or tax returns which they personally prepared or which were prepared under their supervision (R. 101-102, 165-169, 171-172, 177-186, 191-192, 194-196, 200-206). The record further shows that the Union was expressly advised at the hearing that such books and records would be available, and the Trial Examiner admitted the challenged evidence into the record subject to a motion to strike if the Union was not "given suitable access to the records for inspection," or if it could show that the evidence was inaccurate (R. 196, 205, 215, Appendix A at pp. 15-19, *infra*).⁸ No claim has been made by the Union, however, that it requested, but was refused, an opportunity to examine such customers' original books and records in order to verify the testimony given, and the Union has failed to produce any evidence showing that the testimony of the witnesses did not accurately reflect the books. We submit that such competent testimony differed substantially from the hearsay memoranda, unsupported by the testimony of witnesses subject to

⁸Appendix A contains testimony inadvertently omitted from the printed record.

cross examination, rejected in the *Haddock* case, and "could properly be considered by the Board in determining whether this was such a case as would warrant its taking jurisdiction, and in no sense could it, in this respect, be bound by the hearsay evidence rule." *N. L. R. B. v. J. R. Cantrall Co.*, 201 F. 2d 853, 855 (C. A. 9), certiorari denied, 345 U. S. 996; see also *Stephens v. United States*, 41 F. 2d 440, 444 (C. A. 9); *Pallma v. Fox*, 182 F. 2d 895, 901-902 (C. A. 2); *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F. 2d 79, 81 (C. A. 2); *United States v. Mortimer*, 118 F. 2d 266, 269 (C. A. 2).

2. The Union further contended that the procedure followed in establishing the interstate sales of one of the Company's customers, Mississippi Glass Co., resulted in a denial of due process, and that without such sales, the jurisdictional standards are not satisfied. The facts are that one Smith, the office manager of Mississippi Glass, testified that he had prepared a summary of his employer's interstate sales (R. 194-196, 198). When counsel for the General Counsel sought to introduce the summary, which shows the 1954 interstate sales as \$324,015.68 (R. 222), the summary was excluded by the Trial Examiner because Smith's "evidence is in as to the amount" (R. 197). After the close of the hearing, the Trial Examiner discovered that whereas his notes showed the interstate sales of Mississippi Glass to be the above-mentioned amount, the stenographic transcript of Smith's testi-

mony gave the amount as \$32,415.68.⁹ Concluding that the latter figure was erroneous, the Trial Examiner on July 5, 1955, issued and served upon the parties an Order To Show Cause, returnable in person or through affidavits, why the erroneous figure in the transcript should not be corrected (R. 3). In response, counsel for the General Counsel submitted an affidavit by Smith stating that he had "testified to the amount which appeared on the summary which [he] consulted at that time," and that \$324,015.68 represented "the correct amount" of Mississippi Glass' interstate sales "as evidenced by the invoices summarized in the document" (R. 6-9). The Company made no return to the Order, and the Union's response consisted only of a letter challenging the Trial Examiner's "authority to take any action in the correction of the transcript" in the "absence of any motion of any of the parties or a stipulation of the parties for the purpose of correcting the transcript" (R. 5-6). In his Intermediate Report, the Trial Examiner found that "the transcript inaccurately quotes Smith" and accordingly corrected the record so as to show Mississippi Glass' interstate sales as \$324,015.68 (R. 13, n. 1).¹⁰ The Board affirmed this finding (R. 68).

⁹ This amount appears at page 293 of the original stenographic transcript filed with the Clerk of this Court as part of the certified record. The printed record (R. 196) inadvertently shows the correct amount rather than the erroneous amount which actually appeared in the transcript.

¹⁰ The Examiner modified his ruling rejecting Smith's summary, referred to above, and received it "for the single purpose of serving as an explanatory supplement to Smith's affidavit" (R. 15, n. 1).

A mere recitation of these facts, we submit, shows that the procedure followed in correcting an obvious error in the stenographic transcript was proper and fair. The Trial Examiner's action was well within the authority vested in him by the Administrative Procedure Act and the Board's Rules and Regulations.¹¹ As the court pointed out in *N. L. R. B. v. Bryan Mfg. Co.*, 196 F. 2d 477, 478 (C. A. 7), one of the Trial Examiner's "functions is to see that the facts are clearly and fully developed." And although it does not appear that a copy of Smith's affidavit was served upon the Union, the latter was apprised of its existence in the Intermediate Report (R. 14, n. 1). At no time, however, did the Union thereafter challenge the accuracy of the affidavit, or submit evidence contradicting the Trial Examiner's finding, adopted by the Board, respecting the interstate sales of Mississippi Glass, or even request an opportunity to examine Smith concerning his affidavit. Accordingly, it is difficult to see "how, if at all, the [Union] was prejudiced" by the correction of the record. *N. L. R. B. v. Eclipse Lumber Co., Inc.*, 199 F. 2d 684, 686 (C. A. 9). In such circumstances, the most that can be said for the Union is that the failure to serve it with a copy of Smith's affidavit resulted in

¹¹Section 7 (b) of the APA (60 Stat. 241, 5 U. S. C. Sec. 1006 (b)) empowers the Trial Examiner to "(5) regulate the course of the hearing * * * and (9) take any other action authorized by agency rule consistent with this Act." Section 102.35 of the Board's Rules (29 C. F. R. 102.35) empowers the Trial Examiner "(f) to regulate the course of the hearing * * * [and] (j) * * * to introduce into the record documentary or other evidence."

harmless error. Rule 61, Rules of Civil Procedure for the District Courts; *Olin Industries, Inc. v. N. L. R. B.*, 192 F. 2d 799 (C. A. 5), certiorari denied, 343 U. S. 919; *N. L. R. B. v. Ed Friedrich, Inc.*, 116 F. 2d 888, 889 (C. A. 5); *Union Starch & Refining Co. v. N. L. R. B.*, 186 F. 2d 1008, 1013 (C. A. 7), certiorari denied, 342 U. S. 815; *N. L. R. B. v. Air Associates*, 121 F. 2d 586, 589 (C. A. 2).

II. Substantial evidence supports the Board's finding that the Company violated Section 8 (a) (3) and (1) by discriminating against Tooze, and that the Union violated Section 8 (b) (2) and (1) (A) of the Act by causing the Company to do so

The law is well-settled that where a union which does not have a valid union-security agreement causes an employer to discharge an employee for want of union membership, the employer violates Section 8 (a) (3) and (1) and the union violates Section 8 (b) (2) and (1) (A) of the Act. *Radio Officers Union v. N. L. R. B.*, 347 U. S. 17, 40-41; *N. L. R. B. v. Thomas Drayage & Rigging Co.*, 206 F. 2d 857, 859 (C. A. 9); *N. L. R. B. v. J. R. Cantrall Co.*, 201 F. 2d 853, 855-856 (C. A. 9), certiorari denied, 345 U. S. 996. In the instant case, uncontroverted evidence establishes that three weeks after the Company hired Tooze the Union demanded his discharge for non-membership, and the Company acceded to the demand. It follows that by this conduct the Company and the Union violated the sections of the Act referred to above.

While the record in this case contains no suggestion that the respondents had a union-security agreement, it should be noted that even if the Union's demand for Tooze's discharge had been made pursuant to a valid union-security agreement, it would have been unlawful since the demand occurred prior to the expiration of thirty days after Tooze was hired (*supra*, pp. 3-5). Moreover, the demand was unlawful in view of the Union's refusal to accept Tooze's offer to pay the required initiation fee and dues in order to become a member (*supra*, p. 5). Such refusal constituted a denial of membership "on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership," as provided in Section 8 (b) (2). *N. L. R. B. v. International Association of Machinists, Local 504*, 203 F. 2d 173, 175-176 (C. A. 9).

Although the Union filed voluminous exceptions to the Trial Examiner's Intermediate Report, its brief in support of exceptions sought to defend its conduct solely upon the grounds that Tooze was not a member in good standing of another union, and that there was no evidence that Matzko, who had demanded Tooze's discharge on November 17, 1954, "had any connection with respondent union." But Tooze's standing in another union is irrelevant, and the Union stipulated at the hearing "that Matzko was a [Local 2288] union representative and, to-wit, an assistant business agent during the month of November 1954" (R. 149).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board properly asserted jurisdiction over the Company's operations, that the Board's findings are supported by substantial evidence, that the order is valid and proper in all respects, and that a decree should issue enforcing the Board's order in full.

THEOPHIL C. KAMMHOLZ,
General Counsel,

STEPHEN LEONARD,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FREDERICK U. REEL,

MAURICE ALEXANDRE,

Attorneys,
National Labor Relations Board.

DECEMBER 1956.

APPENDIX

EXCERPTS FROM STENOGRAPHIC TRANSCRIPT OF TESTIMONY BEFORE TRIAL EXAMINER

SEE PAGE 8, NOTE 8

[35] WILLIS H. MERRILL, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *

[45] CROSS-EXAMINATION

* * * * *

[48] TRIAL EXAMINER. With respect to those figures you have given, I'm referring to the 70 percent figure and the names of the consignees that you have mentioned, does your company keep records reflecting the names?

The WITNESS. Yes, we do.

TRIAL EXAMINER. And the shipments to them?

The WITNESS. Yes, we do.

TRIAL EXAMINER. Where are those records available?

The WITNESS. At our offices, 1144 West 135th Street.

TRIAL EXAMINER. Are they in your custody?

The WITNESS. Yes, they are.

TRIAL EXAMINER. Have you any objection to showing those records either to counsel here?

[49] The WITNESS. No, not at all, your Honor.

* * * * *

[51] TRIAL EXAMINER. All right. I take it if Mr. Nicoson requested access to the records at your plant you would be glad to show them to him?

The WITNESS. Absolutely.

TRIAL EXAMINER. Are you in a hurry to get back to your place of business right now?

The WITNESS. I have been away from there since 9:00 o'clock this morning.

TRIAL EXAMINER. You would like to get back?

The WITNESS. I would like to but I'm willing to cooperate in any way I can while I'm still here.

TRIAL EXAMINER. I think perhaps this would be better and would save time, from your knowledge of the records that you have here with you, do you think that you could show them to Mr. Nicoson in say a period of ten minutes?

The WITNESS. I don't think I could verify any of those figures in a period of ten minutes; no. It takes a lot of recap work and recap sheets to support it which unfortunately are in my office.

TRIAL EXAMINER. Well, this is what I'm going to do, gentlemen. I think I have come to some kind of conclusion here as to the means of expediting this hearing and still do justice to all concerned. I have in mind the provisions of the Act which require me to follow the rules of evidence applicable to the United States District Courts if practicable.

[52] This witness assured me under oath, Mr. Nicoson, that you may have access to the original records and inspect them at his plant. From what has gone on before, it seems likely we won't conclude this proceeding until quite some time. The witness has stated under oath that it would be inconvenient for him to leave the records here and to spend considerable amount of time here but he is willing to cooperate. I am going to receive the document. I will receive

it subject to any proper motion to strike the document from the record upon a showing to me that the information in the document is inaccurate or should otherwise be excluded or that you have not been given suitable access to the records for inspection. The objection will be overruled.

* * * * *

[235] GEORGE CROSSMOND FEE, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * *

[249] CROSS-EXAMINATION

* * * * *

[253] TRIAL EXAMINER. Mr. Garrett, now that you have had an opportunity to look through these exhibits for identification, I am certainly willing to adhere to my previous condition, if you wish, that is.

Do you want the contents kept here for an additional period?

Mr. GARRETT. Yes, because there are other attorneys involved who may wish to look at them and I can tell them what [254] is in them briefly.

I don't think any harm would be done if they wait here or were held here, for a couple of days. I have looked at them, but Mr. Garrett or Mr. Nicoson may wish to look at them.

TRIAL EXAMINER. Are there any more questions of this witness?

Mr. Weil?

Mr. WEIL. I have nothing else.

TRIAL EXAMINER. We will go off the record for a moment now.

(Discussion off the record.)

TRIAL EXAMINER. On the record.

Mr. Garrett, there is no objection to Mr. Weil having these documents in his custody?

Mr. GARRETT. No.

TRIAL EXAMINER. It will be my condition that Mr. Weil will make these available to the respondents, should they request them. These records will be regarded as records kept in the usual course of business upon identification being made, even although the custodian did not testify or the person who made the entries did not testify. They will be permissible as records kept in the usual course of business, under the Act.

[255] I have taken the position that it would be impracticable to introduce the records themselves in evidence, if considered part of an entire picture, taking into account the other records in this proceeding that have been admitted or would be admitted if we required each and every record to which reference has been made here.

I have laid down the condition that the records General Counsel's Exhibits Nos. 26 through 30 marked for identification will remain here for the perusal of respondents until the close of business here on Friday, and they will be in your custody, Mr. Weil.

TRIAL EXAMINER. All right, that is all.

* * * * *

[290] RICHARD SMITH, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *

[294] CROSS-EXAMINATION

* * * * *

[299] TRIAL EXAMINER. These invoices you testified to, were [300] posted to a certain book?

The WITNESS. Yes.

TRIAL EXAMINER. Would there be any objection to any counsel connected with this hearing, having reference to that book?

The WITNESS. No; there would not.

TRIAL EXAMINER. All right, that is all. Thank you.

*

*

*

*

*

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * *

(6) The term “commerce” means trade, traffic, commerce, transportation or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term “affecting commerce” means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the

right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an

agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7;

* * * * *

(2) To cause or attempt to cause an employee to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon

the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

No. 15172

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

W. B. JONES LUMBER COMPANY, INC., and LUMBER AND
SAWMILL WORKERS' UNION, LOCAL 2288, AFL,

Respondents.

On Petition for Enforcement of an Order of the
National Labor Relations Board.

BRIEF FOR RESPONDENT UNION.

ARTHUR GARRETT,
2200 West Seventh Street,
Los Angeles 57, California,

JAMES M. NICOSON,
111 West Seventh Street,
Los Angeles 14, California,

Attorneys for Respondent Union.

FILED

JAN 14 1957

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
Statement of the case.....	2
Summary of argument.....	3
Questions presented	3
Argument	4
I.	
The National Labor Relations Board did not have assertable jurisdiction of the controversy.....	4
A.	
Sprague Engineering Corporation.....	7
B.	
Johnston Pump Company.....	8
C.	
Wolf Range Manufacturing Company.....	9
D.	
Hammond Manufacturing Company.....	11
E.	
Mississippi Glass Company.....	12
F.	
Southern Heater Company.....	13
G.	
C & M Manufacturing Company.....	14
H.	
Morris D. Kirk & Sons.....	14
I.	
The trial examiner's statement.....	15
J.	
The unsubstantiality of the evidence and the denial of due process	15
II.	
There is no substantial evidence to support a conclusion that respondent union has committed unfair labor practices as alleged	26
Conclusion	28

TABLE OF AUTHORITIES CITED

CASES	PAGE
Associated Press v. Emmett, 45 Fed. Supp. 907.....	22
Edison v. N. L. R. B., 305 U. S. 197.....	17, 21
Freedman v. Stallings, 128 Fed. Supp. 179.....	22
Greenbaum v. United States, 80 F. 2d 113.....	19
Gross v. United States, 201 F. 2d 780.....	20
Jonesboro Grain Drying Company, 110 NLRB No. 67.....	4
Kenilworth Bldg. Corp., In re, 105 F. 2d 673.....	23
National Labor Relations Board v. Haddock Engineers, Ltd., 215 F. 2d 734.....	6, 17, 21
National Labor Relations Board v. Meat Cutters Local, 202 F. 2d 671.....	17, 21
National Labor Relations Board v. Stoller, 207 F. 2d 305.....	25, 26
Philadelphia & Reading Coal and Iron Co., In re, 104 F. 2d 126..	23
United States v. Int'l Harvester Co., 274 U. S. 693.....	19
Willipoint Oysters Co. v. Ewing, 174 F. 2d 691.....	20
Zwack v. Kraus, 133 Fed. Supp. 929.....	19

STATUTES

National Labor Relations Act, Sec. 8(a)(3)	2
National Labor Relations Act, Sec. 8(b)(2)	2, 3, 26
National Labor Relations Act, Sec. 10(e).....	1
United States Code Annotated, Title 29, Sec. 160(c).....	4

TEXTBOOKS

31 Corpus Juris Secundum, p. 919.....	17
31 Corpus Juris Secundum, pp. 930, 933, 936.....	17

No. 15172

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

W. B. JONES LUMBER COMPANY, INC., and LUMBER AND
SAWMILL WORKERS' UNION, LOCAL 2288, AFL,

Respondents.

On Petition for Enforcement of an Order of the
National Labor Relations Board.

BRIEF FOR RESPONDENT UNION.

This case is before the court on petition of the National Labor Relations Board to enforce an order issued by it, dated October 14, 1955. The court's jurisdiction is invoked under the provisions of Section 10(e) of the National Labor Relations Act, as amended (29 U. S. C., Secs. 151 *et seq.*).

Statement of the Case.

Upon a complaint erroneously issued, a hearing was held before a Trial Examiner upon allegations that the W. B. Jones Lumber Company, Inc., had discharged one Donald Tooze in violation of Section 8(a)(3) of the National Labor Relations Act and that Lumber and Sawmill Workers' Union, Local 2288, AFL, had caused this discharge in violation of Section 8(b)(2) of that Act. Both respondents filed answers denying the commission of the unfair labor practices and the assertable jurisdiction of the Board over the controversy. At the hearing, many erroneous rulings were made, evidence was improperly admitted and credited and the Trial Examiner through misconduct denied respondent union the requisites of a fair hearing and due process of law, all of which will be discussed in more detail hereafter. Respondent union filed exceptions to these various errors and misconduct. The Board however adopted the rulings and recommendations of the Trial Examiner in all material respects. Motions by respondent union for dismissal based upon failure to prove by substantial evidence that the Board had jurisdiction and that respondent union had committed the unfair labor practices were made before the Trial Examiner and were overruled and denied in his Intermediate Report.

Summary of Argument.

It is the position of respondent union, to be developed hereafter that the petition of the National Labor Relations Board for enforcement of its purported Order dated October 14, 1955 should be denied for the following reasons: (a) The findings, Conclusions and Order of the Board are supported by substantial evidence on the record considered as a whole and (b) that the Board has not afforded respondent union the requisite due process of law.

Questions Presented.

The basic questions here presented by respondent union are:

1. Whether the Board's Findings of Fact and Conclusions of Law that it had assertable jurisdiction over this controversy are supported by substantial evidence.
2. Whether the Board afforded respondent union the requisites of a fair hearing and due process of law.
3. Whether the Board's Findings of Fact and Conclusions of Law that respondent violated Section 8(b)(2) of the Act are supported by substantial evidence.
4. Whether the Board's Order as to respondent union is too broad and hence unenforceable.

ARGUMENT.

I.

The National Labor Relations Board Did Not Have Assertable Jurisdiction of the Controversy.

At the hearing, the Board, through its General Counsel sought to sustain its exercise of jurisdiction over the present matter by attempting to show that the W. B. Jones Lumber Company (a respondent below) sold its wares in a sum in excess of \$200,000 per annum to customers who in turn had each sold and shipped in interstate commerce products valued in excess of \$50,000 for each customer. The proof was confined to the year of 1954. (See *Jonesboro Grain Drying Company*, 110 NLRB No. 67.) The Trial Examiner and the Board found that its jurisdiction should be asserted on this ground alone, discarding other considerations and factors.¹

The question thus presented for decision is whether the Board has sustained its burden of proving by substantial evidence that the case comes within this limitation, which it has placed upon the exercise of its own jurisdiction.

¹The Board in its brief before this court says that the evidence establishes that Jones shipped over \$30,000 worth of materials from California to Nevada and that this without more would establish that Jones operations are subject to the National Labor Relations Act. (Br. p. 6.) However, neither the Trial Examiner nor the Board decided to assert jurisdiction on this basis. The Trial Examiner expressly refrained from doing so saying that his decision to follow the \$200,000 theory was sufficient to satisfy criteria for the assertion of jurisdiction as described in the *Jonesboro* case. [R. 16, footnote 3.] No exception was filed to this ruling which was adopted by the Board without comment. [R. 68.] (See also 29 U. S. C. A., Sec. 160(c), findings not excepted to are binding on the Board.) We are not here concerned with what the Board might have done but what it did. The court is asked to enforce the order as made and not otherwise.

The "evidence" upon which the case was tried consisted of the testimony of some 25 witnesses who were employees of 25 different concerns located in Los Angeles and Orange Counties of the State of California. These concerns were said to be customers of the Jones Company to which, in the aggregate, Jones sold materials valued in excess of \$200,000, in 1954. To succeed in sustaining the theory of the exercise of jurisdiction in this case, each of these concerns would have to be shown as their, individually, having, in turn, sold or shipped goods in commerce in excess of \$50,000, each.

Of these 25 concerns the Trial Examiner, in his Intermediate Report (adopted by the Board), eliminated all but 15,² apparently on the grounds that the "evidence" offered

²The tabulation of the Trial Examiner [R. 16-17] is set forth here as a convenient aid to the court, including the amounts purchased from Jones.

Sprague Engineering Corporation	\$ 9,069.13
Johnston Pump Company	8,197.70
Stauffer Chemical Company	10,220.85
Wolf Range & Manufacturing Company	6,803.33
Mission Appliance Company	14,415.13
Hammond Manufacturing Company	18,662.20
Mississippi Glass Company	30,028.40
Southern Heater Corporation	8,274.67
C & M Manufacturing Company	26,734.94
Ducommun Metals & Supply Company	19,705.88
National Supply Company	20,801.55
Columbia Pictures Corporation	11,531.97
Chrysler Corporation	8,010.35
Phelps Dodge Copper Products Corporation	4,192.64
Morris D. Kirk & Sons, Inc.	14,263.83
Total	\$210,912.57

At the hearing it was stipulated that as to Stauffer Chemical Company, National Supply Company, Columbia Pictures, Chrysler Corporation, Phelps Dodge Copper Products Corporation and Mission Appliance Corporation, each had, during the period in question, shipped in excess of \$50,000 in interstate commerce. The total purchases, from Jones, by these latter concerns is \$69,172.29.

by the Board's General Counsel was so insubstantial that a finding based thereon would not stand.

Respondent here contends, as it did before the Trial Examiner and the Board, that the burden of proving assertable jurisdiction was upon the Board's General Counsel and he failed to sustain that burden by the introduction of substantial evidence that the customers of Jones had each sold in interstate commerce goods valued in excess of \$50,000, in 1954.

This court, in *N. L. R. B. v. Haddock Engineers, Ltd.*, 215 F. 2d 734,³ reiterated the well established rule that the burden of proof to establish jurisdiction was upon the Board, where as here the question of the Board's jurisdiction is put in issue by the pleadings. [R. 15, 92; Bd. Exs. 1-E and 1-H not printed.]

In order to consider whether the Board has sustained its burden of proving its jurisdiction by substantial evidence, it becomes necessary to set forth in some detail, the testimony given by employees of the concerns considered by the Trial Examiner and Board together with certain objections and rulings.

³The Trial Examiner held that *NLRB v. Haddock Engineers Ltd.*, *supra*, was inapposite because the evidentiary point at issue was whether a written admission, bearing on commerce facts, made by the company respondent was binding on the union. The Trial Examiner, however, did not try to disapprove the court's holding that the burden of proof was upon the Board's General Counsel. The Trial Examiner also argues that since the phrase "in so far as practicable" was not mentioned in that case the court had no occasion to apply or construe it. In this, we believe the Trial Examiner did not read into the case the obvious holding that encompassed in the burden of proof was the obligation of showing lack of practicability. [R. 16.] In any event the Trial Examiner did not reverse the court's holding that the burden of proving jurisdiction was upon the Board and that this obligation could only be fulfilled by substantial evidence on the point. We suggest that the *Haddock* case has further meaning which we will hereafter show.

A.

Sprague Engineering Corporation.

William Merrill, testified that he was the Secretary-Treasurer of this company and that he had prepared a summary of his company's *purchases* from Jones Lumber Company from the books and records of the company; that the books were under his control and that the amount of purchases was \$5,600 Merrill was then asked if he had any knowledge of the sales of the company to which he replied "For the fiscal year ending September 30, 1954, they were approximately \$5,600,000.00." Respondent objected and moved to strike this on the grounds that the answer was not responsive and not the best evidence. The objections was overruled and the motion denied. [R. 103-104.] Merrill was then asked to tell what proportion of those sales were shipped in interstate commerce. Respondent objected on the grounds of no proper foundation, hearsay and not the best evidence and as calling for a legal conclusion of the witness. Trial Examiner ruled that the question called for his knowledge and overruled the objection. Merrill then stated that at least 70% of "it is interstate." On cross-examination Merrill stated that the 70% that went into interstate commerce was not represented by a figure present in the courtroom but that the figure of \$5,600,000 was a published figure of annual sales. He gave no testimony as to the sources of this annual sales figure, nor did he have any records present in court to sustain his guess as to the correctness of the published figure. [R. 105.] Merrill was asked if he could give examples of some of the persons to whom shipments were made and the amounts. He said he could if he were prepared but that he did not have this information in his head. He further

stated that he had no idea as to the amounts. [R. 105-106.] Upon being prodded by the Trial Examiner, Merrill mentioned some companies to which shipments had been made and their states of location but he was unable to state how much of the "70%" each of them received [R. 106-108], at least not from records he had with him. [R. 108.] Respondent then moved to strike his testimony with respect to that portion having to do with "interstate" commerce on the grounds of no proper foundation, hearsay, and not the best evidence. The motion was denied. [R. 108.]

The General Counsel then offered Exhibit 3 (not printed) and objections as to not the best evidence, conclusions, no proper foundation, incompetent, irrelevant and immaterial were made and overruled. Merrill stated the company records were in Gardena, California, about 13 miles from the hearing, except as to some data he had with respect to purchases, which he declined to leave at the hearing for inspection of respondent. [R. 109.]

B.

Johnston Pump Company.

George C. Fee, was called by the General Counsel and testified that he was the administrative assistant to the General Manager of the Johnston Pump Company, which is located in Pasadena, California; that his duties were many and varied but that he reviewed daily invoices and most of the price literature. [R. 165-166.] He said that Johnston shipped out of California and that each shipment is covered by an invoice and that he had brought some of the invoices with him, explaining that they were invoices to special buyers, not a customer but a distributor. He said that he had recently gone over these invoices

(contained in five binders which he had with him) and that from the course of his review he was able to testify concerning shipments outside of California; that the invoices were in the custody of the accounting department and that some of the invoices had previously come to his attention, that he had obtained the invoices from the accounting department which makes them out and keeps them in a file [R. 168], and that the invoices were the original entries of the accounting department, most of which had been posted to the books. [R. 169-170.] When asked to leave the invoices and binders for inspection of respondent. The witness declined. [R. 171.] He was then, over objection, asked to tell the approximate value "of the shipments" [R. 171], and stated he had not totaled up the figures for any of the invoices in these binders and then was asked if the invoices reflect shipments in a value in excess of \$50,000 and he answered "yes." He did not however, testify that the total in excess of \$50,000 reflected shipments in interstate commerce. [R. 175-176.] The binders containing the invoices were marked as exhibits but were not offered in evidence. [R. 175.]

C.

Wolf Range Manufacturing Company.

The General Counsel called, as a witness, Robert H. Lancaster, who testified that he was office manager for Wolf Range Manufacturing Company, located at 5731 South Alameda (Huntington Park, California), that his main duty was credits of dealers and also had charge of accounts payable, that there was a Mr. Danielson who handled the ledgers, accounts receivable and general ledger and that two girls received orders and made billings

[R. 177], that none of these were completely under his supervision. He testified that the company maintained a sales journal, that the primary record comes from invoice files that are recorded in the journal and from there posted to various accounts. He said that he did not prepare the invoices but that he checked the price. The invoices were posted to the journal by Danielson who had done this type of work for nearly the past two years. [R. 178-179.] Lancaster testified that he had not made a summary from the accounts showing sales to dealers in states other than California but that he had brought the tax reports to the state of California. He said he could have brought the sales journal but thought the tax report might suffice. The sales journal, he said, was a book about three inches thick and about 15 to 18 inches long [R. 179-180], and contains approximately about 150 pages and that the book was not in current use. [R. 180.] He further stated that he had an adding machine tape which showed the total of sales to customers out of the state. He stated that Danielson made up the tax reports which he had brought and that the report was made from the invoice file [R. 181-182] and that the tax reports are made up quarterly. He testified that the tax report file which he had with him was kept to assist the auditors of the State Board of Equalization who make an audit about every two or three years. From these reports he says there is a figure which indicates shipments out of state in the sum of \$55,729.61 for a three month period. However, he did not testify that the figure was correct or that he had confirmed the correctness of the figure. [R. 187.] Lancaster further stated that the books of invoices were not present in the hearing room and the 1954 figure was covered by the sales journal and that to support the journal he should

have the copies of the invoices which were in the company's office. He further stated that the sales journal did not show what was shipped and that resort to the invoices would have to be made to confirm that figure. Finally he stated that the tax report was made from the sales journal. [R. 188-189.]

D.

Hammond Manufacturing Company.

Roy Frederickson, chief accountant for Hammond Manufacturing Company, called as a witness by the General Counsel testified that his duties were to prepare financial statements and supervise the office as far as accounting is concerned and that the company records of sales are in a sales journal and individual invoices, that the sales journal is kept by a Mrs. Rau [R. 191] and that he supervises her work. These records in summary are posted to the general ledger and sales tax return. In answer to a question, "Have you prepared a summary of the sales during the year 1954 for your company" and he replied "I have prepared financial statements from those sales and I do have the sales tax returns." He testified that he prepared the tax returns from the sales journal and that the tax returns show where the merchandise is shipped. Frederickson handed General Counsel a sales tax return for "the fourth quarter" 1954 which was marked for identification as General Counsel's Exhibit 32. The tax return is sent to the state. From this tax return he was allowed to say that the value of goods shipped out of state was \$444,325.45 Mr. Frederickson did not present any financial statement nor did he have any records other than the tax return at the hearing. [R. 192-193.]

E.

Mississippi Glass Company.

The evidence given as to this company's business was through Richard Smith, office manager for the Company, which is located in Fullerton, California. His duties consisted of "supervision and carrying out of order for my superior and also keeping records and data." [R. 194.] He stated that the company kept records of all shipments by invoices which are prepared by a billing clerk under his direction. These invoices occupy a full drawer space in the filing cabinet and the files are in daily use. He testified that he had prepared a summary from these files, which was marked General Counsel's Exhibit 33 for identification. [R. 195-196.] He said that at the end of every month a similar summary is made and General Counsel's Exhibit 33 was taken from those summaries. [R. 196.] He said it would be possible for respondent to check the invoices and stated the total sum of the invoices was \$32,415.68⁴ which stood for shipments out of state. General Counsel's Exhibit was offered in evidence and objection was made on the ground that it was not the best evidence and was incompetent, irrelevant and immaterial. The Trial Examiner excluded the exhibit, stating Smith's "evidence is in as to the amount." On cross-examination Smith said the company kept an invoice file which was at the office in Fullerton. He stated he was asked to bring a summary of the invoices but had not brought the invoices as they were too heavy. He said

⁴This figure erroneously appears as \$324,015.68 in the printed records whereas the stenographic transcript appears as noted above. The Trial Examiner ordered the figure changed from \$32,415.68 to \$324,015.68 to accord with the notes taken by him at the hearing. We shall deal further with this phase in our discussion of denial of due process, *infra*.

the summary he brought was not a record kept in the ordinary course of business, that there was a summary in the office files but that he had not brought that summary as he did not want to disturb the office files, that this summary is a report. [R. 198-199.] Smith further stated that the invoices were posted to a certain book and there would be no objection to respondent having reference to that book at the company's plant. (Pet. Br. p. 19.) Smith did not testify that the summary was correct.

F.

Southern Heater Company.

Capitola Fierke, a bookkeeper for Southern Heater Company testified that she keeps record of accounts receivable, accounts payable and the general ledger, that records of shipments—bills of lading and invoices—are kept. Another person prepares the invoices, which when made up are filed until shipment is made and then a bill of lading goes to the shipping clerk and customer is billed. She said she had not brought the invoices as they were bulky and because the 1954 invoices were used all the time. According to her there would be no objection if respondent inspected the invoices at the plant which was in Compton, California. [R. 201-205.] She presented a summary which she did not prepare and on which "she made a little check but not much." As a result of this summary she calculates the sales out of California to be \$1,799,815.00, and presented an adding machine tape. She stated she could not tell what the tape actually represented without checking with other figures and that the only way she could determine how much material was shipped would be to go back to the invoices and review them. [R. 206-207.]

G.

C & M Manufacturing Company.

Harry McCully, president of C & M Manufacturing Company says his company ships out of state and that he obtained his knowledge from receiving orders and shipping completed units—that the company sells in the eleven western states and that 50% of the business is out of state. He testified that the company did approximately \$1,300,000 business in 1954. [R. 208-209.] He said that he was not asked to bring the invoices and that he had not done so, that the invoices were on file in the plant. When asked if “there is likely to be available in your office actual figures showing your sales outside of the state of California . . .” he answered, “I don’t know—personally I don’t know.” He then said the figures were in the possession of the bookkeeper at the company’s plant. [R. 209-210.]

H.

Morris D. Kirk & Sons.

Robert Morse a witness for the General Counsel testified that he was the treasurer of this company and that his duties were financial accounting. He keeps sundry cost, statistical and financial records. The billing department of the company makes up the invoices of sales which are the original records. He stated the company ships out of state to all eleven western states. He presented some invoices which were marked for identification as General Counsel’s Exhibit 35 and stated these were invoices he selected to show out of state shipments to the extent that I needed \$50,000 and that his secretary had totaled them to the sum of \$52,719.72, but that he had not checked the figure on the tape. He did not testify that the figures were correct. [R. 212-214.]

I.

The Trial Examiner's Statement.

At the end of the hearing the Trial Examiner made the following statements:

"I have taken the position, if it isn't clear that in connection with these witnesses who have testified as to figures, if it is brought to my attention that the respondent union has any difficulty in verifying any of the information from the records, I would entertain a motion to strike all of the testimony that has been given in connection with the figures. [R. 215.] . . . I have taken the position that it would be impracticable to load up this proceeding with all of the records that have been referred to throughout and I have been reasonably satisfied that with these neutral parties, the records will be available to any of the parties for any check they wish to make. [R. 215.] I suppose when it comes down to . . . the question of dollars and cents whether you have or not established within the Board's criteria the dollar value of out of state shipments by various concerns proceeding on the assumption you have established that the respondent company has made \$200,000 worth of sales to concerns; they have in turn, sold goods or services totalling at least \$50,000 each, outside of the state of California." [R. 216.]

J.

The Unsubstantiality of the Evidence and the Denial of Due Process.

From the foregoing testimony a clear pattern emerges, showing that persons, strangers to the controversy and having no interest in the result, were permitted to give opinions, conclusions and observations with respect to their respective companies' engagement in interstate com-

merce. In most cases they neither supported their conclusions with records of their companies nor did a single one of these witnesses testify under oath that the figures they gave were correct.

A sharp example is revealed in the testimony of Harry McCully, president of C & M Manufacturing Company where he was permitted to say that his company in 1954 did approximately \$1,300,000 worth of business and that 50% of that amount was outside. When asked whether there was likely to be actual figures showing the sales outside of California for the year 1954, he answered "I don't know". When urged by the Trial Examiner to answer the question "yes" or "no", Mr. McCully again answered, "personally, I don't know". From this testimony the obvious hearsay aspects become clear. It is a matter of common knowledge that where a president of a corporation does not keep the books he relies upon what he is told by some other person as to the figures concerning the company's business.⁵ He frankly stated that he did not know if there were actual figures in the company's files which would should the amount of out of state business. Nor were any records, or summary of records offered to substantiate his statement. He admitted that he did not make all of the sales himself; that the sales manager and others made sales as well as himself. No offer was made of any records for the inspection of respondent or its use of such records, if there were any, in cross-examination. That McCully's testimony was obviously hearsay cannot be refuted because by his admission, he did not keep the records, the correctness of which depended upon the competency of Mrs. Garrett, who though apparently available

⁵McCully testified that the bookkeeping of the company was in charge of Katherine Garrett. [R. 210.]

was not called as a witness and hence the substance of McCully's statements could not be cross-examined to reach the activities of Mrs. Garrett. Under the well established rule, evidence is hearsay and inadmissible when the probative force of evidence depends in whole or in part on the competency and credibility of some person other than the witness by whom it is sought to produce it. 31 C. J. S. 919, and statements otherwise hearsay do not become competent because they have been reduced to writing or sworn to by the witness. (31 C. J. S. 930, 933, 936.) Under this rule the statements of McCully were not admissible and not probative. There was no evidence given in corroboration of McCully's statement. The result being that so far as the purchases by C & M Manufacturing Company could not be counted in arriving at the necessary figure of \$200,000. In this instance the purchases were said to be the sum of \$26,734.94, which when deducted from the amounts of purchases found by the Trial Examiner and adopted by the Board reduces the sales to Jones customers to \$184,177.63 and thus the requisite sum of \$200,000 is not reached and under the Board's limitation the exercise of its jurisdiction should not have been asserted.⁶

⁶It is to be noted that while Jones through the General Counsel introduced hearsay as to the amount of its sales to C & M Manufacturing Company, McCully did not corroborate such sale. Thus even the statement of the sales to C & M amount to no more than uncorroborated hearsay and does not amount to substantial proof of this item. (*Edison v. N. L. R. B.*, 305 U. S. 197, 229-230; *N. L. R. B. v. Haddock Engineers, Ltd.*, 215 F. 2d 734; *N. L. R. B. v. Meat Cutters Local*, 202 F. 2d 671.) Likewise, with the exception of Sprague Engineering Company, none of the purported customers, through their employees called as witnesses by the General Counsel gave any corroborating testimony with respect to the amounts, if any, of their respective companies' purchases from Jones during 1954 and thus the evidence in the records as to sales by Jones to the customers amounts to uncorroborated hearsay which is not sufficient to prove that Jones sales exceeded the \$200,000 requisite.

Similarly, the witness called by the General Counsel of the Board gave opinions and conclusions, some of which were purported summaries of original records in the respective records of the companies by which they were employed. Some of them brought data which they claimed were the basis of their conclusions, but in only two instances was respondent permitted access to those records for the purpose of inspection and cross-examination.

Two witnesses, Capitola Fierke and George Fee, admitting they have certain supporting records present in the hearing, refused to permit the record to be inspected or used for cross-examination and they were permitted by the Trial Examiner to take those records back to their respective plants. [R. 202-205; 170-171.]

Summaries were submitted by Capitola, Lancaster, Frederickson and Morse, all witnesses for the General Counsel. Each admitted that the records of the company had not been brought into the hearing and in the case of Lancaster he did not prepare a summary of the sales from the company records but merely brought a copy of what he said was a tax report. Lancaster said he could have brought the sales journal⁷ but had not done so. Morse presented a summary prepared by his secretary which he had not checked. [R. 214.] Frederickson stated that his company (Hammond Manufacturing Company) had a sales journal kept by a Mrs. Rau, which contained a summary of the sales invoices. That he had brought neither

⁷Lancaster testified that he had not kept the sales journal for over two years and that the journal was being kept by a Mr. Danielson, who it appears could have been present along with the sales journal. [R. 178-180.] No corroboration of his testimony was attempted.

of these records but had brought a tax report,⁸ which he said was prepared entirely from the sales journal. From this tax report he was permitted to give a figure of his company's engagement in interstate commerce. The tax return was not introduced in evidence. Merrill was permitted, over objection to testify that 70% of his company's business was interstate and admitted that he had no figure at the hearing to substantiate his statement. He said that the figure he had obtained from a published annual sales figure but he did not testify as to how or from what this financial statement was made nor did he produce it. [R. 105-106.] He was unable to state that any portion of the 70% was shipped to customers which he named. [R. 106-109; Bd. Br. pp. 15-16.]

From the foregoing we believe that enough has been shown to strongly indicate the unsubstantial character of the evidence on which the Board bottomed its finding of jurisdiction. That this evidence was inadmissible is supported by a long unbroken line of cases decided by this court beginning with the decision of Judge Rudkin in 1933 and in 1935 reaffirmed by Judge Denman in *Greenbaum v. United States*, 80 F. 2d 113, 120. There, Judge Denman pointed out that this court had followed a rule that where books of account are offered as evidence against one not a party chargeable with an interest in their keeping, that in order to lay a foundation for the admission of such evidence it must be shown that the books were either the original entries or the first permanent entries of the transactions. Judge Denman commenting upon the testimony of accountants summarized from examination of

⁸Tax reports do not constitute proof of their contents. (*Zwack v. Kraus*, 133 Fed. Supp. 929, 936; *United States v. Int'l Harvester Co.*, 274 U. S. 693, 703.)

such books and records pointed out that the human factor, in such procedure, required that such evidence should not be permitted as to books not available for the purpose of cross-examination and that such conclusions, in the absence of the books, for the purpose indicated, were inadmissible as evidence. Judge Denman pointed up the absence of testimony that all of the pertinent original entries were in the material offered in evidence. There as here the invoice files preceded journalization and were necessary in determining the validity of the summaries, the absence of which made the summary hearsay and inadmissible.

Again, in *Willipoint Oysters Co. v. Ewing*, 174 F. 2d 691, this court, in this regard, said:

“As we held in *Agustin v. Bowles*, 149 F. 2d 93, 96, the rule is that ‘where voluminous documents are necessary part of the evidence in a cause, it is well settled that tabulations of these documents in the form of charts, and schedules may be introduced for the aid of the trier of fact. Most courts require that the mass thus summarily testified to, be placed on hand in court so that the opposing party may inspect them and use the material for cross-examination. To that rule we adhere.’”

Again in a later case, *Gross v. United States*, 201 F. 2d 780, 787 this court reiterated the above view and said:

“This court and many other circuit courts of appeal have frequently approved charts, calculations, tabulations and summaries in both civil and criminal cases where such documents were prepared from original records which were *available for inspection and use in cross examination.*”

We submit that under the weight of these uniform authorities the Board has not borne the burden of proving by substantial evidence that the instant controversy comes within the jurisdictional acceptance of the Board. The testimony offered by the General Counsel, under these citations was clearly hearsay, uncorroborated. As hearsay it was under the ordinary rules of evidence not admissible. Under the rule as laid down by the Supreme Court of the United States and this court in *Edison v. Board, supra*, *N. L. R. B. v. Haddock Engineers, Ltd., supra*, and *N. L. R. B. v. Meat Cutters, supra*, such hearsay being uncorroborated by admissible evidence cannot amount to substantial evidence sufficient to sustain a finding of the Board.

The Board argues in its brief that the necessity for the production of the supporting records to the summaries and conclusionary evidence was rendered unnecessary by the ruling of the Trial Examiner that respondent could have access to these records at the respective plants of the customer and if respondent found any errors or was not permitted inspection, that upon a proper motion he would strike such evidence. But the fallacy of that position lies in the fact that it is not according to the law as pronounced by this court and others. The position overlooks the fact that by this procedure respondent is foreclosed from its right to cross-examine the witnesses as to the documents and amounts. No provision was made by the Trial Examiner to permit cross-examination after inspection. In the instances where the witnesses had documents in court, the Trial Examiner did not permit inspection but set up the rule that the witnesses could return to their plants with the documents and permit inspection there. But inspection at their plants would not afford respondent any right of cross-examination.

The Trial Examiner said he took this position that under the provisions of the Taft-Hartley Act, which states:

“Any such proceeding shall, *so far as practicable*, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1943—(U. S. C. title 28, 723-B, 723-C).” (Emphasis supplied.)

Under this he ruled that it would be “impracticable” to require these witnesses to bring in the supporting books and records for inspection and cross-examination, but that inspection would be afforded at the respective plants of the companies and he put upon respondent the burden of visiting these twenty-five plants, located throughout Los Angeles and Orange counties and requiring travel of approximately 200 miles, and then if errors were detected to bring them to his attention by motion and he would strike the evidence. The Trial Examiner did not point out why it would be more “practicable” to require respondent to assume such a burden, and as we have indicated he made no provision for cross-examination in any event. We submit, that the Trial Examiner had no legal authority to make such a ruling and by denying the right of cross-examination to respondent denied respondent a fair hearing and due process of law. The Trial Examiner obviously was treating the convenience of the witnesses over that of respondent. But the word “practicable” does not mean practicable to the parties.

Associated Press v. Emmett, 45 Fed. Supp. 907, 911 (D. C. Cal.);

Freedman v Stallings, 128 Fed. Supp. 179, 181 (D. C. N. C.);

In re Kenikworth Bldg. Corp., 105 F. 2d 673, 676 (C. A. 7);

In re Philadelphia & Reading Coal and Iron Co., 104 F. 2d 126, 127 (C. A. 3).

We submit that in another respect the Trial Examiner denied due process and arbitrarily resolved an issue against respondent.

During the hearing, Richard Smith testified as indicated above. The stenographic transcript of his testimony revealed that he had testified to the amount of his company's exports in commerce to be \$32,415.68. [Steno. Tr. p 293.] The Trial Examiner upon his own motion issued an order to show cause why this figure should not be corrected to accord with the notes he had taken during the hearing. In response the General Counsel, without consultation with respondent obtained an affidavit from Smith [R. 8-9] and without serving a copy on respondent filed this affidavit with the Trial Examiner who then without further consultation, as to the filing of the document or the failure to have it served on respondent, found that his note was right and in his Intermediate Report ordered the transcript to be corrected to show the figure \$324,015.68 to which procedure and finding respondent duly excepted. At no time prior to the receipt of the Trial Examiner's Intermediate Report did respondent have any knowledge that the General Counsel had filed an affidavit of Smith and it was not until the printed record of these proceedings was given to respondent did it have access to the affidavit or the contents thereof.

The Board argues that this procedure is approved by the Board's rules and regulations which require the Trial Examiner to see that the facts are clearly and fully

developed. But of course this has reference to the Trial Examiner's conduct at the time of the hearing and not *ex parte* action on his part to supplement the record. The Board also raises the question that respondent failed to challenge the accuracy of the affidavit. Of course this was impossible because respondent had no access to the affidavit or its contents. The affidavit, not subject to cross-examination was given full credence by the Trial Examiner without knowledge being imparted to respondent of his doing so, at least before his comments appeared in the Intermediate Report. That this conduct was highly prejudicial to respondent is indicated by the fact that had not this questionable and unwarranted action been taken by the Trial Examiner the sum of \$30,028.40 would have been removed from the sum of the purchases and thus *rendered that sum less than the requisite \$200,000.00.* Aside from this improper conduct of the Trial Examiner the purported affidavit of Smith does not sustain the conclusions of the Trial Examiner because Smith, in his affidavit states that he has no recollection of the exact amount to which he testified at the hearing [R. 8-9], that since being asked to make the affidavit he had consulted "the summary" to which he referred in his testimony and find that the figure there is \$324,015.68. [R. 9.] The Trial Examiner, without affording respondent knowledge of this affidavit, or providing for cross-examination admits an exhibit which he had previously excluded on the objection of respondent. From this he concludes that the stenographic transcript is wrong and orders it corrected to confirm to his notes and the conclusionary statements of Smith's affidavit. [R. 13-15.]

We submit that this was highly improper and denied to respondent the due process of law required and hence his

correction of the record was unwarranted and the conclusions reached by him and approved by the Board, in this respect, are void.

The proceeding further fails to comply with the requisites of due process in that the complaint was not signed by the Regional Director as the rules and regulations of the Board require. The signature of the Regional Director was placed there by a person other than that officer without any order of the Board having been issued authorizing the same. Under the Board rules, the "Regional Director means the agent designated by the Board as regional director for a particular region." (Rules and Regs., series 6 as amended, p. 1.) Under the rules only the Regional Director designated by the Board has authority to issue and signed complaints. (Bd. Rules and Regs, *supra*, Sec. 102.15, p. 4.) Consequently any agent not designated by the Board as regional director has no authority to issue or sign a complaint even though that person signs the name of the designated regional director. For this reason the complaint issued in this matter was invalid and all proceedings thereunder are a nullity.

It is submitted that the Board's jurisdictional conclusions are not supported by substantial evidence and that respondent has been denied the requisite due process of law and the case should be dismissed in its entirety.⁹

⁹Petitioner relies on *N. L. R. B. v. Stoller*, 207 F. 2d 305, 307, as being authority for the proposition that it is for the Board not the court to determine whether jurisdiction should be exercised. The court, however, in that case emphasized, that in any event the Board's finding with respect to jurisdiction must be supported by substantial evidence on the record considered as a whole. Here, the Board restricted its exercise of jurisdiction to a limited set of circumstances. The case was heard and the Board decided jurisdiction on the basis that customers of Jones who were themselves

II.

There Is No Substantial Evidence to Support a Conclusion That Respondent Union Has Committed Unfair Labor Practices as Alleged.

On the merits, the complaint alleged and the Board found that respondent union had caused the employer, W. B. Jones Lumber Company to discharge Donald Tooze in violation of Section 8(b)(2) of the National Labor Relations Act, and that respondent union had refused to give a clearance to Tooze because he was not a member in good standing with respondent union.

The evidence in this regard was that a John Matzko demanded the discharge of Tooze under a threat of picketing and that the employer acceded to the demand and effect the termination of Mr. Tooze.

Tooze at the time, had been suspended from membership by a sister local of respondent union for an infraction of the constitution and by-laws of respondent's International Union. Tooze was duly tried, was found guilty and declined to appeal his conviction as provided in that constitution. After his trial, he ceased paying his dues into the union.

When Tooze arrived in Los Angeles in July or August of 1954, he was in arrears in his dues payments for five or six months.

engaged in commerce had purchased \$200,000 of materials from Jones. A failure to show, by substantial evidence both of these contingencies, by the Board's own standards creates a condition over which the Board has publicly stated it would not take jurisdiction. Petitioner's argument based on the *Stoller* has no application, because the court is concerned only as to whether the findings were supported by substantial evidence not what the Board might have held had the theory and proof been otherwise.

After he was discharged, he made an abortive attempt to proffer dues payments, not to the local union to which he owed the dues but to respondent union which had no authority to receive them. Tooze admittedly was being counseled by a rival union whose competition was detrimental to the welfare of the Carpenters' union. In furtherance of these attempts to undermine respondent and to upset the disciplinary action taken against him, he arranged a series of events which were made to appear that his discharge was caused by the respondent, when in fact his own conduct was the reason of his termination, as for example his attempt to pay his back dues to a local which had no authority to receive them. He knew that in so doing he was acting improperly in an effort to escape the result of his wrong doings in the sister local.

In reaching its decision that respondent union had violated the act, the Trial Examiner and the Board utilized evidence admitted solely against the company and which the trial examiner ruled would not be taken as against the respondent union [R. 112, 113, 114, 133-138, 150-151, 152], to find that respondent union had committed the unfair labor practice alleged.¹⁰

We submit that fairly considered the Board's evidence does not meet the standards of proof to sustain the conclusion that respondent union had committed the unfair labor practices as alleged and found.

¹⁰While the Jones Company was a respondent below and the Board issued its order against the company as well as respondent union, and filed the instant petition against the company as well as the union, the Board in its brief before this court withdraws its request for enforcement of the order against the company because the company is willing to comply with the order. This however, does not excuse the use of evidence admitted solely against the company to be used against respondent union and the basic findings of violation supported by such evidence must fail for want of substantiality and as an infringement on due process.

Conclusion.

For the reasons heretofore advanced it follows that the petition for enforcement of the Board's order must be denied and an order entered setting aside the Board's Decision and Order in full.

Respectfully submitted,

ARTHUR GARRETT,

JAMES M. NICOSON,

Attorneys for Respondent Union.

No. 15172

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

W. B. JONES LUMBER COMPANY, INC., AND LUMBER AND
SAWMILL WORKERS' UNION, LOCAL 2288, AFL, RE-
SPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD

KENNETH C. McGUINNESS,
General Counsel,

STEPHEN LEONARD,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FREDERICK U. REEL,
MAURICE ALEXANDRE,
Attorneys,
National Labor Relations Board.

FILE

FEB - 2 1957

PAUL P. O'BRIEN,

INDEX

AUTHORITIES CITED

Cases:	
<i>Marshall Field & Company v. N.L.R.B.</i> , 318 U.S. 253.....	Page 5
<i>N.L.R.B. v. Cantrall</i> , 201 F. 2d 853 (C.A. 9), certiorari denied, 345 U.S. 996	5
<i>N.L.R.B. v. Pinkerton's National Detective Agency</i> , 202 F. 2d 230 (C.A. 9)	5
<i>N.L.R.B. v. Wiltse</i> , 188 F. 2d 917 (C.A. 6), certiorari denied, 342 U.S. 859	6
<i>Olin Industries, Inc. v. N.L.R.B.</i> , 192 F. 2d 799 (C.A. 5), cer- tiorari denied, 343 U.S. 919.....	6
Statute:	
National Labor Relations Act, as amended (61 Stat 136, 29 U.S.C., Secs. 151, <i>et seq.</i>):	
Section 10 (e)	4
Miscellaneous:	
N.L.R.B. Rules and Regulations, Series 6, Sec. 102.15.....	6

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15172

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

W. B. JONES LUMBER COMPANY, INC., AND LUMBER AND
SAWMILL WORKERS' UNION, LOCAL 2288, AFL, RE-
SPONDENTS

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

**REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

This reply brief will deal with certain inaccuracies in the Union's brief and with several contentions which are there raised for the first time.

1. The Union's principal contention is that the evidence adduced to show the interstate sales of several of the customers of Jones Lumber Company should be disregarded, and that the aggregate of the sales made by Jones Lumber to its remaining customers is below the \$200,000 figure required by the Board's jurisdictional standards, discussed in our main brief at page 7. The Union's position appears to be that in seeking to

establish the amount of the interstate sales of eight such customers, the General Counsel failed to adhere to the rule that where summaries, tabulations, charts or schedules of financial records are sought to be introduced as evidence of the data contained therein, the original records must be made available for inspection and use in cross-examination. This contention is without merit since the Board's findings (R. 17) ¹ respecting the interstate sales of the eight customers were based, not on naked hearsay memoranda, but upon sworn testimony of witnesses available for cross-examination, and the Union had access to the books and records supporting the documents used by such witnesses while testifying.

Thus William Merrill, secretary-treasurer of Sprague Engineering Co., testified that he had "knowledge" that his company's sales for the fiscal year ending September 30, 1954, were approximately \$5,600,000, that 70% thereof involved sales to customers in "[p]ractically every state in the United States" (R. 103-105).² George C. Fee, administrative assistant to the general manager of Johnson Pump Co., testified, on the basis of his personal review of invoices which he had brought to the

¹ Reference to portions of the printed record are designated "R." Occasional references to the typewritten stenographic transcript of testimony, certified as part of the record herein, are designated "Tr."

² Merrill stated that because they were his only copies, he preferred not to surrender custody of company records which he had brought with him to substantiate G.C. Exhibit 3 (R. 217), showing his company's *purchases* from Jones Lumber Co. (see our main brief, pp. 15-16, R. 108-109). He added, however, that both the purchase and sales records would be available for examination by the Union at his company's offices in Gardena, California, thirteen miles away from Los Angeles, where the hearing was being held (*ibid.*).

hearing, that his company's interstate sales exceeded \$50,000 (R. 171-175).³ Robert H. Lancaster, Office Manager of Wolf Range Manufacturing Company, using duplicate California sales tax returns prepared by an employee under his supervision (R. 184-185),⁴ testified that his company's out-of-state sales amounted to \$55,-729.61 for a single three-month period in 1954 (R. 186-187). Roy Frederickson, chief accountant for Hammond Manufacturing Co., using California sales tax returns which he had personally prepared,⁵ testified that for the fourth quarter of 1954, his company's sales to out-of-state customers (exclusive of the United States Government) amounted to \$444,325.45 (R. 192-193). Richard Smith, office manager of Mississippi Glass Co., using a summary which he had personally prepared

³ Contrary to the Union's contention (Brief, pp. 9, 18), Fee did not decline to "leave the invoices and binders for inspection of respondent" and did not refuse "to permit the records to be inspected or used for cross-examination." The record shows that in response to an inquiry by the Trial Examiner, Fee stated that he could see no reason why there would be any objection to leaving some of the records at the hearing for two or three days, but preferred to obtain company permission to do so (R. 171). The hearing was then recessed to permit examination of the records by Union counsel, who thereafter used them in his cross-examination (R. 173-175, Tr. 252). Finally, the evidence shows that with the Union's consent, the Trial Examiner ruled that the records would remain in the custody of counsel for the General Counsel from May 25 to May 27, 1955, subject to examination by the Union (see our main brief to this Court, pp. 17-18).

⁴ These returns were submitted for examination to Union counsel (R. 179), who used them during his cross-examination of Lancaster (Tr. 274). The latter stated that he "could produce the files containing the invoice copies" of this company's 1954 out-of-state sales, but was not requested to do so (*ibid.*).

⁵ Counsel for the Union examined such returns (R. 192), and stated on the record that he was "not going to object to the document" (R. 193).

from data in his company's files,⁶ testified that the company's 1954 sales to out-of-state customers totaled \$324,015.68 (R. 195-196).⁷ Capitola Fierke, office manager of Southern Heater Corp., testifying from a summary of sales invoices prepared at her request by an employee under her supervision,⁸ stated that Southern's 1954 sales to out-of-state customers amounted to \$1,799,875.00 (R. 205-206). Harry McCully, president of C & M Manufacturing Co., on the basis of his "own knowledge" and "apart" from company records, testified that approximately 50% of his company's 1954 sales, totaling \$1,300,000.00, involved out-of-state customers (R. 208-209, Tr. 317).⁹ Robert Morse, treasurer of Morris D. Kirk

⁶ This summary was admitted into evidence for a limited purpose (see our main brief, pp. 9-10). Smith stated that if counsel so desired, they would be permitted to examine the original invoices from which the summary was prepared (R. 196). Smith's office is in Fullerton, California, 26 miles from Los Angeles (R. 194).

⁷ In an affidavit submitted to the Trial Examiner, Smith stated that although he had "no present recollection of the exact amount to which I testified," he had "checked the office copy of the summary to which I referred in my testimony and I find thereon that the figure to which I testified is \$324,015.68," which "is the correct amount" (R. 8-9). The Union's claim (Brief, pp. 23-24) that it had no access to the affidavit is without foundation. After the Intermediate Report gave the Union notice of the existence of the affidavit, (R. 13-15 n. 1), the Union was in a position to request a copy of the original affidavit, which was in the official files of the Board and open to inspection. The Union made no attempt to inform itself of the contents of the affidavit, to file a rebuttal affidavit, or to ask for a reopening of the hearing in order to cross-examine Smith.

⁸ The summary was exhibited to Union counsel for examination, and Fierke stated that there would be no objection if any party to the proceeding went to her office to examine the invoices (R. 204-205). Fierke's office is in Compton, California, 12 miles from Los Angeles (R. 200).

⁹ The Union's objection to McCully's testimony is barred by Section 10(e) of the Act. This objection was not made in the Union's brief in support of exceptions, and its exceptions contained only

& Sons, stated that his company ships goods to “the eleven western states and Alaska and Hawaii, and the Philippine Islands”; and testifying from a few invoices of out-of-state shipments which he had selected and from an adding machine tape,¹⁰ stated that the aggregate of the invoices amounted to \$52,719.72 (R. 213-214).

The foregoing witnesses were cross-examined at length by the Union. Moreover, as shown in our main brief (p. 8), although the Trial Examiner advised the Union that he would strike their testimony if the “union has any difficulty in verifying any of the information from the records” of the witnesses (R. 215), the Union has neither claimed nor shown that it was denied access to such records or that any of the witnesses’ testimony was inaccurate. We accordingly submit that the evidence objected to was no less substantial than that which this Court accepted in *N.L.R.B. v. J. R. Cantrall Co.*, 201 F. 2d 853, 855, certiorari denied 345 U.S. 996.¹¹

2. The record shows that William G. Braley, credit manager of Jones Lumber Co., gave uncontradicted testimony establishing that the sales made by his company to customers with interstate sales above \$50,000 exceeded \$200,000 in 1954 (see our main brief, p. 2). Con-

“a general objection which did not apprise the Board that [the Union] intended to press the question now presented.” *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 255; *N.L.R.B. v. Pinkerton’s National Detective Agency*, 202 F. 2d 230, 233 (C.A. 9).

¹⁰ These documents were examined by Union counsel, who stipulated that the tape contained a correct total of the figures thereon (R. 214-215).

¹¹ Since the aggregate sales made by Jones Lumber to customers with interstate sales above \$50,000 exceeded by \$10,912.57 the \$200,000 figure provided in the Board’s jurisdictional requirements, the sales to some of these customers may be disregarded without impairing the propriety of the Board’s findings.

trary to the Union's assertion (Br. p. 17, n. 6), the fact that such customers did not give evidence corroborating the sales to them does not convert such competent testimony into hearsay. Moreover, this contention was not raised before the Board and hence is not properly before this Court. Section 10(e) and cases cited at pp. 4-5, n. 9, *supra*.

3. For the first time in this litigation, the Union (Br. 25) attacks the validity of the complaint on the ground that it was not signed by the regional director, as required by the Board's rules. Under Section 10(e) of the Act, this contention is not properly before the Court. Moreover, the Union has submitted no evidence to show that the signature on the face of the complaint was not that of the acting regional director. In addition, the Board's rules provide only that the director shall "issue" a complaint. NLRB Rules and Regulations, Series 6, Sec. 102.15. The Union has not shown that someone other than the acting director issued the complaint. In the absence of such a showing, "we must assume that the law has been complied with." *N.L.R.B. v. Wiltse*, 188 F. 2d 917, 920 (C.A. 6), certiorari denied, 342 U.S. 859; See also *Olin Industries v. N.L.R.B.*, 192 F. 2d 799 (C.A. 5), certiorari denied, 343 U.S. 919, and the cases there cited.

4. Finally, there is no merit to the Union's contention (Br., p. 27) that the Board based its unfair labor practice finding (i.e., that the Union unlawfully caused Jones Lumber Company to discharge Employee Tooze because he was not a member of the Union) upon evidence admitted into the record solely against Jones Lumber Company. The critical fact establishing the unfair labor practice is that, according to the undisputed testimony of Hardy, the yard superintendent for

Jones Lumber, Assistant Business Agent Matko told him that Tooze was not a member of the Union and could not continue working (R. 111-112). Such competent testimony was properly admitted by the Trial Examiner (R. 112), and constitutes substantial evidence supporting the Board's finding (see our main brief, pp. 12-13).

CONCLUSION

For the reasons stated herein and in our main brief, it is respectfully submitted that a decree should be issued enforcing the Board's order in full.

KENNETH C. MCGUINNESS,
General Counsel,

STEPHEN LEONARD,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FREDERICK U. REEL,

MAURICE ALEXANDRE,

Attorneys,
National Labor Relations Board.

FEBRUARY 1957.

No. 15173.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GABRIEL T. MARTINEZ and THERESA MARTHA MARTINEZ,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Chief of Criminal Division,
Asst. United States Attorney,

ROBERT JOHN JENSEN,
Asst. United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

FILED

FEB 15 1957

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
I.	
Jurisdictional statement	1
II.	
Statement of the case.....	2
III.	
Statement of facts.....	3
IV.	
Argument	11
A. Sufficiency of the evidence (including inferences of guilt outweighing presumption of innocence).....	11
Appellants' specifications of errors—Points I and III.....	11
B. The search and seizure.....	28
1. The entry of the premises.....	28
2. The search incident to an arrest.....	31
3. The consent of Theresa Martinez.....	34
C. Proof and pleading of overt act.....	38
Conclusion	40

TABLE OF AUTHORITIES CITED

CASES	PAGE
Agnello v. United States, 269 U. S. 20.....	28, 31, 32
Amos v. United States, 255 U. S. 313.....	34, 35
Bachenberg v. United States, 283 Fed. 37.....	28
Bartkus v. United States, 21 F. 2d 425.....	25
Bartlett v. United States, 166 F. 2d 920.....	16, 20
Berger v. United States, 295 U. S. 78.....	39
Brinegar v. United States, 338 U. S. 160.....	31, 32, 33
Brown v. United States, 222 F. 2d 293.....	26
Butler v. United States, 197 F. 2d 561.....	25
Carroll v. United States, 267 U. S. 132.....	31, 32
Charles v. United States, 215 F. 2d 831.....	27, 33
Chin Wah v. United States, 13 F. 2d 530.....	25
Coates v. United States, 59 F. 2d 173.....	14, 21
C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, cert. den. 344 U. S. 892.....	13
De Bonaventura v. United States, 15 F. 2d 494.....	24
Dennert v. United States, 147 F. 2d 286.....	24
Elwert v. United States, 231 F. 2d 928.....	15, 23, 27
Eng Jung v. United States, 46 F. 2d 66.....	24
Ferris v. United States, 40 F. 2d 837.....	19
Fisher v. United States, 8 F. 2d 978.....	20
Gullo v. United States, 302 U. S. 764.....	24
Harris v. United States, 331 U. S. 145.....	32
Higgins v. United States, 209 F. 2d 819.....	36, 37
Kathriner v. United States, 276 Fed. 808.....	28
Kwong How v. United States, 71 F. 2d 71.....	31
Marino v. United States, 91 F. 2d 691.....	14, 17, 21, 24, 25, 38
Martin v. United States, 100 F. 2d 490.....	14
Mattus v. United States, 11 F. 2d 503.....	30, 31

McDaniel v. United States, 24 F. 2d 303.....	25
McDonough v. United States, 299 Fed. 30.....	39
Miller v. United States, 9 F. 2d 382.....	28
Mullaney v. United States, 82 F. 2d 638.....	31
Pasadena Research Laboratories v. United States, 169 F. 2d 375, cert. den. 335 U. S. 853.....	13
Penosi v. United States, 206 F. 2d 529.....	13
People v. King, 294 P. 2d 972.....	30
People v. Maddox, 294 P. 2d 6.....	29
People v. Sayles, 295 P. 2d 579.....	30
Raine v. United States, 299 Fed. 407, cert. den. 266 U. S. 611	34
Reavis v. United States, 106 F. 2d 982.....	14, 18
Remmer v. United States, 205 F. 2d 277.....	27
Shew v. United States, 155 F. 2d 628.....	34
Smith v. United States, 50 F. 2d 46.....	39
Stein v. United States, 166 F. 2d 851, cert. den. 344 U. S. 844..	34
Stevens v. United States, 206 F. 2d 64.....	12
Stoppelli v. United States, 183 F. 2d 391, cert. den. 340 U. S. 864, 340 U. S. 898.....	27
Sugarman v. United States, 35 F. 2d 663.....	25
Telman v. United States, 67 F. 2d 716.....	14
Turcott v. United States, 21 F. 2d 829.....	25
United Cigar v. United States, 113 F. 2d 340.....	16
United States v. Di Re, 332 U. S. 581.....	28, 30
United States v. Empire Packing Company, 174 F. 2d 16, cert. den. 337 U. S. 959.....	13
United States v. Gypsum Co., 333 U. S. 364.....	38
United States v. Mitchell, 322 U. S. 65.....	36, 38
United States v. Pesano, 193 F. 2d 355.....	27
United States v. Rabinowitz, 339 U. S. 56.....	32

	PAGE
United States v. Ragen, 314 U. S. 513.....	39
United States v. Sferas, 210 F. 2d 69.....	34
United States v. Stoppenbeck, 61 F. 2d 955.....	24
United States v. White, 228 F. 2d 832.....	27
United States v. Wodiska, 147 F. 2d 38.....	12
Vachina v. United States, 283 Fed. 35.....	28
Ventimiglio v. United States, 61 F. 2d 619.....	25
Woodward Laboratories, Inc., et al. v. United States, 198 F. 2d 995	13
Zamloch v. United States, 193 F. 2d 889.....	20

RULES

Federal Rules of Criminal Procedure, Rule 52(a).....	39
--	----

STATUTES

Penal Code, Sec. 836.....	28
Penal Code, Sec. 844.....	29
United States Code, Title 18, Sec. 2.....	15
United States Code, Title 18, Sec. 371.....	1
United States Code, Title 18, Sec. 3231.....	1
United States Code, Title 21, Sec. 174	1, 26
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1294.....	2

No. 15173.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GABRIEL T. MARTINEZ and THERESA MARTHA MARTINEZ,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California, which adjudged appellants to be guilty of certain counts of an indictment (see Statement of Case, below), which indictment was brought under the provisions of Section 371 of Title 18 and Section 174 of Title 21, United States Code [R. 43-52].

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California [R. 3-6].

The jurisdiction of the District Court is based upon Section 3231, of Title 18, United States Code. This court has jurisdiction to entertain this appeal and to review the

proceedings leading to said judgment by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II. STATEMENT OF THE CASE.

An indictment in five counts was filed on March 21, 1956 [R. 6], essentially charging the appellants and others in the first four counts as follows:

Count I, from August 1, 1955 until the return of the indictment both appellants, Cesario Gavaldon, Joel Hernandez and Luis Campos conspired together to receive, conceal, transport and sell narcotics.

Count II, on February 27, 1956, appellant Gabriel T. Martinez and said Gavaldon and Hernandez received, concealed and transported 204 grains of heroin.

Count III, on February 27, 1956, appellant Gabriel T. Martinez and said Gavaldon and Hernandez sold 204 grains of heroin to Jack C. Howe.

Count IV, on February 27, 1956, both appellants received and concealed 32 grains of heroin [R. 3-6].

The fifth count of the indictment was dismissed on motion of the Government [R. 29, 34].

All defendants below initially pleaded not guilty [R. 8-9]; Hernandez later changing his plea to guilty under Counts Two and Three [R. 30].

After plea but prior to trial appellants moved for the return of certain property and its suppression as evidence [R. 9-12], which motion was opposed by the Government [R. 13-28] and after a hearing thereon said motion was denied by the trial court [R. 29, 33].

Trial commenced May 22, 1956 [R. 30, 57] and resulted in a verdict of guilty against all of the defendants, including appellants, as to each of the counts in which they were charged [R. 41-43]. Appellants had moved for judgment of acquittal at the close of the Government's case in chief and at the close of all the evidence [R. 37, 40]; they also renewed their motion to suppress evidence [R. 40].

Judgment was entered on June 11, 1956 [R. 43-52]. Notice of appeal was filed June 19, 1956 [R. 53-56].

III.

STATEMENT OF FACTS.

Jack Charles Howe, who is a sporadic user of heroin, frequently purchased such narcotics in the vicinity of Temple and Alvarado Streets, Los Angeles, during the months of October through December of 1955 [R. 95-96]. It was here that he first met the defendant Hernandez [R. 70-71, 94] and was able to make a purchase of heroin from him [R. 97]. Howe also had appellant Gabriel T. Martinez pointed out to him at this location and thereafter saw Martinez several times in this vicinity [R. 70, 93-94]. Gabriel was known to Howe and others as "Velli" [R. 77].

In November 1955, appellants Gabriel T. Martinez and Theresa Martha Martinez had jointly purchased a house at 3040 Atwater Street, Los Angeles, paying \$6,000.00 cash as the down payment [R. 59-62] and each making payments on the note for the balance [R. 62]. Apparently possession of these premises was given to the appellants Martinez in December, 1955 or January 1956 [R. 60]. Appellants were known to be co-occupants of the premises thereafter.

In January 1956, Howe's method and place of securing narcotics shifted to the immediate vicinity of the 3040 Atwater Street premises [R. 97]. On five separate occasions commencing in January 1956, at intervals between four or five days and a week and ending on February 27, 1956, Howe made purchases of heroin in this area [First Transaction: R. 72-79, 108-115; Second: R. 80-83, 118-122; Third: R. 83-86; Fourth: R. 87-88, 126-127; Fifth: R. 89-92].

In each instance, Howe first contacted defendant Hernandez at Hernandez's home on Boylston Street [R. 98], then, sometimes in company with others, Howe and Hernandez would drive to a point near an ice cream stand near the Atwater home of the appellants and park [R. 75-76, 80, 84, 87]. In each instance defendant Hernandez made a telephone call from a booth nearby [R. 76, 80, 84, 87, 90], and minutes later a person would leave the house at 3040 Atwater Street and join Howe and Hernandez, delivering a quantity of heroin [R. 78-79, 82-83, 86].

On the first, third and fourth such occasions, it was appellant Gabriel T. Martinez who came out of the 3040 Atwater Street premises to deliver the heroin [R. 76-77, 84-85, 88]. On the second and fifth such occasions it was the defendant Gavaldon who left said premises to make the delivery [R. 81, 90-91].

On the fourth such occasion of Howe's purchasing heroin, appellant Gabriel T. Martinez, who left the house and delivered the narcotics, was accompanied part way by the defendant Campos. Campos and Gabriel left the house together and Campos was seen to look up and down the street several times [Tr. 87, 126-127]. It was on this occasion that appellant Gabriel stated to Hernandez that

he could supply as much "junk" as wanted and at any time [R. 88]. There had been other conversations between Howe and Hernandez wherein Hernandez stated he could get any amounts of heroin Howe wanted at "Velli's" [R. 91].

Prior to the fifth such transaction, Howe testified he had made a full disclosure of all the details of the foregoing to Agents Jones and Gullon of the Bureau of Narcotics [R. 89]. Howe then entered into the fifth transaction while being observed by Jones and Gullon [R. 89-91].

Agents Jones and Gullon of the Los Angeles Office of the Bureau of Narcotics after being informed of the details of Howe's activities in purchasing heroin from Hernandez, Gavaldon and Gabriel T. Martinez [R. 129] as set forth above, requested Howe to make another purchase [R. 129]. On February 27, 1956, Howe was supplied with \$140 for such purchase and the serial numbers of the bills were recorded [R. 129]; thereafter, Howe met Hernandez at the latter's home [R. 130, 172] and they proceeded to the ice cream stand at Fletcher and Atwater, arriving there at approximately 2 P. M., after Jones and Gullon had located themselves in that area [R. 130-134].

Hernandez bought some ice cream, made a phone call from a nearby booth [R. 174] and then proceeded down Atwater [R. 134]. Gavaldon left the premises at 3040 Atwater, crossed the street and met him [R. 135, 175]. Currency was exchanged; (on a subsequent search Hernandez was found with \$20.00 and Gavaldon with \$120.00 of the original \$140.00 given to Howe by the officers [R. 167, 185]). As Agent Gullon approached, Gavaldon threw down a package which was retrieved by Jones [R. 136, 175].

Gavaldon and Hernandez were arrested [R. 136, 175] and at that point spoke to each other in Spanish [R. 136-137], a language understood by Agent Gullon [R. 177]. Their conversation was in essence as follows: Hernandez asked what happened to the package; Gavaldon said he threw it away; Hernandez asked if anything happened, would Velli take care of it; Gavaldon stated there was nothing to worry about, that Velli was waiting for the money *at the house*, and if he didn't show up at any time, that Velli knew what to do and would take care of everything [R. 177-178]. (Emphasis added.)

A field test was made immediately on the contents of the package which Gavaldon had thrown down and it was found by the officers to be a derivative of opium [R. 150-151, 176]. The situation as it was then known to the officers was discussed and they determined to make an immediate arrest of appellant Gabriel T. Martinez whom they believed to be in the premises at 3040 Atwater Street [R. 154, 178].

Jones went to the front door and Gullon to the back door, each identified himself as a federal narcotics agent and demanded admittance [R. 138, 179]. At the same time both officers heard noises of moving furniture, shuffling and running feet, coming from inside the house [R. 139, 180]. Jones immediately began to break in and was the first to enter [R. 199]. Gullon, while in the course of identifying himself and demanding admittance, observed the appellant Theresa Martha Martinez locking the door which was between them. He immediately forced an entrance, kicking in the door [R. 179-180, 198].

Jones, after entering, found himself in the living room, with bedrooms to his left, and the kitchen toward the rear of the house [R. 140]. As he moved toward the second

bedroom, Campos, whom he recognized from a description furnished by Howe, ran out of the bedroom "full tilt" into him [R. 140-141]. Campos then turned and ran back into this bedroom. Jones shouted that he was a federal narcotic agent, that Campos was under arrest, and followed into the bedroom [R. 141]. A second man was climbing out of the bedroom window and Campos started to follow. Jones fired a warning shot low and to the left of the window, while ordering the men to halt, and then he grabbed Campos by the legs in an effort to hold on to him, but Campos kicked free and went on outside [R. 141-142]. When Jones looked out the window he was fired on by the other man, one of the shots striking Jones in the hand [R. 143]. Jones fired another shot over the head of Campos, as he fled towards the street between the adjacent houses, and Jones continued to call upon Campos to halt. A third shot hit Campos in the buttocks as he reached the front of the house and he fell on the front lawn [R. 143]. Jones left the house by the window and gave chase after the other man, but was unable to catch him [R. 144].

In the meantime, Gullon, who had entered by the rear door, made a quick search of the premises for appellant Gabriel T. Martinez, but found no one in the house except appellant Theresa Martha Martinez [R. 180, 199, 290]. He then went to the front yard, placed Campos under arrest, returned to the house and telephoned for an ambulance and for additional officers [R. 180-181].

Uniformed officers of the local police arrived first, and an ambulance and four other Federal Agents arrived about the time Agent Jones returned from his chase [R. 144, 147, 157-159, 200-201]. These agents and some plain-clothes officers came into the house, but no search was

commenced until Agent Gullon asked appellant Theresa Martha Martinez for permission to look for narcotics [R. 157, 164, 188]. Permission to commence the search was given by her upon first being requested, which occurrence was about thirty minutes after the breaking in by the officers [R. 145-146, 148-149, 156, 181-183]. Additional permission was requested and received as the officers moved from room to room [R. 147-148]. The requests and replies were made in both English and Spanish [R. 183]. Appellant Theresa Martha Martinez's attitude was described as cooperative [R. 183], and she replied on one occasion that she had no objection because any narcotics found would belong to Velli [R. 145]. No force was used in the course of the search [R. 147-148].

Prior to the search of the kitchen, appellant Theresa Martinez was asked by Gullon about her use of the kitchen. She replied that she used the stove and all of the utensils and, in effect, stated that she did the cooking [R. 184]. In another conversation during the search appellant Theresa Martha Martinez stated that on one occasion she had seen Velli, Gavalton and Campos fooling with a powdery substance on the kitchen table [R. 149]. At another time when shown a package of capsules which had been found in an oatmeal box, appellant Theresa Martinez replied that it belonged to Velli and she stated she had warned Velli to "get rid of these friends of his, they were all going to get into trouble." [R. 148-149.]

There were boxes of empty gelatin capsules, similar to the filled ones found in the package thrown down by

Gavaldon, open to view in the kitchen and on one occasion appellant Theresa attempted to hide such a box and knocked it to the floor, spilling the contents [R. 149, 195-196].

A package of capsules filled with heroin was found in an Albers Oatmeal box which was in the kitchen cupboard [R. 209, 186-187]. Two tins of powdered milk sugar were found in the same cupboard [R. 210]. A large quantity of balloons and finger stalls were found in a utensil drawer in the kitchen [R. 211]. Three boxes of gelatin capsules were found in a waste basket on the back screened porch [R. 210-211]. Balloons with their tops cut off were found in the back yard [R. 213], and a small paper "bindle" of loose heroin was found in the garage [R. 214].

Each of the packages of capsules full of heroin was made up of capsules wrapped tightly in a balloon with its top cut off short just above the contents, or in a finger stall similarly [R. 111, 113, 150, 152-153]. In some, the smaller packages were contained in a larger package, also made from a balloon or finger stall [R. 150].

Chemical analysis showed that the package recovered in the street [Ex. 3, R. 168]; the package found in the kitchen [Ex. 4, R. 185-186]; and the bindle from the garage [Ex. 11, R. 214]; all contained heroin, a derivative of opium [R. 219-220]. It also showed that Exhibits 3 and 4 were from a common source, by reason of their containing the same amounts of chlorides, traces of novocain, quantities of milk sugar, and being the same color

[R. 221]. The milk sugar contained in the tins found in the kitchen was of the same kind as the lactose or milk sugar mixed with the heroin [R. 221-222].

The weight of the three separate quantities of heroin (described above) was as follows: Exhibit 3, 174 grains after analysis, plus 12 to 15 grains used in analysis; Exhibit 4, 29 grains, plus 6 grains used; Exhibit 11, 3 grains, plus 1 or 2 grains used [R. 222-223].

Appellants Gabriel and Theresa Martinez were known to drive a 1956 Lincoln Premier and a 1956 Oldsmobile 98 [R. 159, 189], the first being owned by Theresa [R. 286], and the second being in the name of Gabriel [R. 164, 190, 284]. Appellant Gabriel admitted at one time owning and paying "almost \$6,000.00" for the Lincoln [R. 162, 189]. He also stated to the officers that he had several bank accounts, in one of which the deposit was \$6,000.00 [R. 163, 190], that he wasn't working at this time but when he worked it was as a student barber. He stated he had won money gambling in the army [R. 163].

Appellant Gabriel's testimony on this point was to the effect that he hadn't worked since 1950 [R. 287], that he had saved his money from army service as a private first class and from money earned standing combat watches for his buddies [R. 288-289]. He was discharged from the Army in 1952 [R. 287].

Appellant Theresa Martha Martinez was shown to be the proprietor of a restaurant with a capacity of twelve customers [R. 275].

Additional facts will be discussed as they become pertinent to the argument.

IV.

ARGUMENT.

A. Sufficiency of the Evidence (Including Inferences of Guilt Outweighing Presumption of Innocence.)

Appellants' Specifications of Errors—Points I and III.

Two preliminary matters should be discussed. Appellants argue that the evidence is insufficient to sustain the convictions on all counts in which they are charged and convicted. Much of their argument is based upon the proposition that each of the transactions involved were "isolated transactions under the conspiracy charge", and not evidence under Counts II, III and IV of the indictment, stating that counsel for the government had so limited his proof in his offer to the court [see p. 12 of App. Br., citing Tr. p. 73]. The offer was *not* so restricted. "We represent this is part of the conspiracy *and part of the acts*, and we will tie it in later" [R. 73].

The government's theory was and is that within each of the substantive counts of transportation and sale (Counts II and III), there was a concert of action between Hernandez, Gavaldon and appellant Gabriel T. Martinez. It was and is the government's position that all prior transactions have probative value as to these counts (and also to Count IV, to be discussed later), as well as to the conspiracy count (Count I).

Appellants in their brief also attempt to confuse the proof in respect to the amounts of heroin involved in each of the substantive counts (see pp. 12 and 15). The proof, however, is clear that Exhibit 3 was the heroin being delivered and sold and which was thrown down in the street by Gavaldon on February 27, 1956 [R. 168-169]; that Exhibit 4 was concealed in the oatmeal box

in the kitchen of the Martinez' house [R. 185-186, 208-209]; and that Exhibit 11 was concealed in the garage [R. 214].

It is true that it is pleaded in Count II that 204 grains were received, concealed and transported and that the proof is that Exhibit 3, which is applicable to this count, contained 174 grains after examination, but originally contained 186 to 189 grains [R. 222-223]. It is submitted that the variance here between 204 grains and 186 to 189 grains, is immaterial.

United States v. Wodiska, 147 F. 2d 38 (2d Cir., 1945);

Stevens v. United States, 206 F. 2d 64 (6th Cir., 1953).

Count III, which charges the sale of the same heroin, also refers to 204 grains. Again, Exhibit 3 is the heroin offered in proof of this count and again the proof is that 186 to 189 grains are involved instead of 204 grains as pleaded [R. 222-223].

In respect to Count IV, the concealment by both appellants of 32 grains of heroin, as pleaded, the government offered as proof the quantity found in the kitchen of their jointly owned home, which was Exhibit 4 and which weighed 29 grains after examination and 35 grains before examination [R. 222-223]. Again, we submit the variance between the 32 grains pleaded and the 35 grains proved is immaterial.

Exhibit 11, the "bundle" of 3 grains, after examination plus 229 grains used and found in the garage, was offered as proof of a similar act of concealment. It could have been the basis of a separate charge, but was not.

Neither the before-examination weight nor the after-examination weight of these exhibits totals 204 grains as asserted by appellants (pp. 12 and 15 of brief). Total weight of all three exhibits before examination was 225 to 229 grains; after examination 206 grains.

To review all the evidence in the record relative to these charges is beyond the scope of a brief. Further, this court is not confined to the bare statements of the witnesses but should consider the evidence and *all the inferences* which may reasonably be drawn therefrom in the aspect most favorable to supporting the verdict or findings of the court below.

Woodward Laboratories, Inc., et al. v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9th Cir., 1948), cert. den. 335 U. S. 853;

Penosi v. United States, 206 F. 2d 529, 530 (9th Cir., 1953);

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (9th Cir., 1952), cert. den. 344 U. S. 892;

United States v. Empire Packing Company, 174 F. 2d 16 (7th Cir., 1949), cert. den. 337 U. S. 959.

A reasonable inference from the facts testified to is that appellant Gabriel T. Martinez was engaged in a series of transactions with Hernandez and Gavaldon for the transportation and sale of narcotics—that the conduct of all three was joint and, as a result of a tacit agreement or understanding.

It is not necessary that proof be adduced to show an express agreement to violate the law. Circumstantial evidence to the effect that defendants are acting in concert as the result of an informal understanding for a common purpose is sufficient.

Coates v. United States, 59 F. 2d 173 (9th Cir., 1932);

Reavis v. United States, 106 F. 2d 982, at 984-985 (10th Cir., 1939);

Telman v. United States, 67 F. 2d 716 (10th Cir., 1933);

Martin v. United States, 100 F. 2d 490 (10th Cir., 1938);

Marino v. United States, 91 F. 2d 691, at 694 (9th Cir., 1937).

Here we have three men engaged in transporting and selling narcotics under a procedure which conforms to an exact pattern which was repeated five times. The only differences between the various sales are that the delivery was made on some occasions by Gavaldon and on others by Gabriel Martinez and at one time Campos accompanied Gabriel, inferentially acting as lookout.

Each time, just before the delivery, Hernandez made a telephone call, and moments later the delivery was made by either Gavaldon or Gabriel Martinez leaving the home at 3040 Atwater Street. A reasonable inference is that the call was made to that place, the narcotics were gathered from their hiding place, and the delivery was commenced.

Cognizant permission by Gabriel Martinez to the use of his home as the base of distribution would in itself be aiding and abetting the transportation and sale of

narcotics by Gavaldon and would subject Gabriel to punishment as a principal to such transportation and sale.

Sec. 2, Title 18, U. S. C.

Such knowledge and such permission on the part of Gabriel T. Martinez could reasonably be inferred from the frequency of the transactions, his own deliveries of narcotics, his own statement to Hernandez in the presence of Howe that he could supply as much "junk" as wanted and at any time [R. 88], and that the deliveries were made in each instance from his home.

The jury could have drawn the further inference that Gabriel Martinez was financially interested in these transactions from his statements made to the officers about the amounts of his bank accounts, his ownership of the two cars, and the size of the cash down payment on the home, each taken together with his statements to the officers and his testimony to the effect that he had not worked since 1950 [R. 287] and had left the army in 1952 [R. 287]. The jury was fully justified in disbelieving the explanation offered on the source of his money.

Elwert v. United States, 231 F. 2d 928, at 933-934 (9th Cir., 1956).

The use of the home as a base of operations is further substantiated by the fact that Howe purchased his narcotics in the latter part of 1955 on Temple Street [R. 95-96], buying narcotics on one occasion from Hernandez [R. 97], but shifted with Hernandez to purchases of narcotics which were delivered from the Martinez home in January 1956. This is about the time the Martinezes took possession of that property.

After showing these men to have been acting together, the jury could properly consider Hernandez's remark that he could get any amounts of heroin Howe wanted at Velli's [R. 91] against all three.

Bartlett v. United States, 166 F. 2d 920 at 925 (10th Cir., 1948).

As we understand it, appellant Gabriel T. Martinez argues two propositions as to the insufficiency of the evidence against him on Counts I, II and III:

First, that the prior transactions are "isolated transactions" and by this we assume he means they were not the result of concerted action to which he was a party; second, that he was not present on February 27, 1956, when the transportation and sale set forth in Counts II and III were consummated.

Whether or not these five transactions are "isolated" from one another and independently undertaken by the persons shown to be engaged therein is a question of fact, now decided by the jury's verdict.

This question must necessarily be submitted to the jury where the transactions are tied together by time, there was an over-all elapse of time on these five sales from early in January to February 27, 1956; by location, all took place in the same immediate area of less than a block from the Martinez home; and by similarity of procedure; and by similarity of object.

It is not necessary that a person be present at the commission of a crime to be a participant therein or to be punished as a principal thereof.

United Cigar v. United States, 113 F. 2d 340, 346 (9th Cir., 1940), and cases there cited.

Nor is it necessary that participation by aiding, abetting or counselling the commission of a crime be shown by direct evidence. Circumstantial evidence is sufficient.

Marino v. United States, 91 F. 2d 691 at 698 (9th Cir., 1937).

Notwithstanding the foregoing, the jury could properly have concluded that Gabriel T. Martinez was present at 3040 Atwater Street on February 27, 1956, and that he escaped through the bedroom window upon the officers' entrance. The evidence shows that after identifying themselves and demanding admittance the officers heard a great deal of commotion inside the house [R. 139, 180]; that it was about ten seconds thereafter before Jones was able to get inside the house [R. 139]. Yet even after this lapse of time Campos came running out of the bedroom and collided with Jones in the living room. We suggest that the jamup to get out of the bedroom window was so great that Campos was seeking another way out. Even after all this, when Jones entered this bedroom he saw a man then in the act of leaving by the window [R. 142]. Surely there had been time for more than one to leave, and isn't it reasonable to deduce that there was another who preceded the man Jones saw?

In this connection, notwithstanding the bland statement of Appellants' Brief at page 14 to the contrary and the cases which are there cited which are not in point, we believe the jury was entitled to consider the conversation between Gavaldon and Hernandez which occurred in Spanish to the effect that Velli was waiting at the house for the money.

First of all, there was no objection made to this conversation being testified to by any of the defendants be-

low [R. 177-178] and there was no motion to strike. It was incumbent upon appellants to request the trial court to limit the conversation to the participants.

“It is urged that the testimony of the secret service agent that Reavis and Smith stated to him in the presence of Carroll that the three of them came to town together and that Carroll did not deny the statement was inadmissible and prejudicial to Carroll. The argument is that a person under arrest on a criminal charge is not called upon to deny or contradict statements of others made in his presence tending to connect him with the offense, and that such statements though not denied or contradicted by him are not admissible against him. The contention is met with two obstacles. First, no objection was interposed to the testimony at the time of its admission. The statement is made in the brief of appellants that the testimony was admitted over objection but the record fails to support the statement. The record is barren of any objection whatever. Ordinarily a defendant in a criminal case cannot remain silent when evidence is offered against him and thereafter be heard to complain in respect of its admissibility. Such a quiescent attitude constitutes a waiver of the question. Furthermore, the testimony was clearly admissible as against Reavis and Smith, and it was the duty of Carroll to request that it be limited to them if he so desired. No such request having been made in any form, he cannot be heard to complain on appeal that the testimony was inadmissible and prejudicial as to him.”

Reavis v. United States, 106 F. 2d 982 at 985 (10th Cir., 1939).

Second, this was a statement made to further the objects of the conspiracy and to advise a conspirator of the

disposition and further *concealment* of narcotics. We quote the testimony: (Testimony of Michael Gullon.)

“* * *

“He then asked the defendant Gavaldon in Spanish, ‘What happened to the package?’

“The defendant Gavaldon stated in Spanish, ‘I threw it away.’

“The defendant Hernandez then asked the defendant Gavaldon if anything happened that Velli would take care of it.

“The defendant Gavaldon stated that there was nothing to worry about, that Velli—that is, the defendant Gabriel Martinez, as they called him—that Velli was waiting for the money at the house, and if he didn’t show up at any time that Velli knew what to do and would take care of everything.”

Although the general rule is that the conspiracy ends as to an arrested conspirator, there are exceptions as to whether what is said or done thereafter by him is admissible against the other conspirators.

In *Ferris v. United States*, 40 F. 2d 837 (9th Cir. 1930), this court recognized such an exception as to certain actions of arrested conspirators which tended to implicate other conspirators not then present. The court said:

“However, in the case at bar we are of the opinion the conspiracy was not terminated even as to Sanchez and Wilson upon their arrest. The object of the conspiracy was the successful transportation of contraband liquor. The means adopted to carry that object into execution was the actual transportation by defendants Sanchez and Wilson driving and accompanying the loaded auto-truck under convoy of appel-

lants equipped with a machine gun and colt revolver. Until the convoy was *hors de combat* by the arrest of appellants the conspiracy was not terminated as to any of its participants.”

In the above case the court was concerned with the credibility of the *conduct* of Sanchez and Wilson after arrest being greater than the credibility of declarations and so permitted it to be described. Here the authenticity and credibility is evidenced by the factor that Hernandez and Gavaldon were speaking a language they obviously thought was not understood by the officers.

It is clearly shown that the statement was made immediately upon arrest [R. 136-137].

See also:

Fisher v. United States, 8 F. 2d 978 (1st Cir., 1925);

Zamloch v. United States, 193 F. 2d 889 (9th Cir., 1952).

On all the foregoing it is submitted the question of appellant Gabriel T. Martinez's guilt was properly one for the jury under Counts I, II and III.

Although the evidence has been discussed above only as it relates to Gabriel T. Martinez and Counts I, II and III of the indictment, this was done for convenience, and we do not intend to create the impression that the further discussion of the evidence as to Count IV and the appellant Theresa Martha Martinez should be considered separately.

Once a conspiracy is shown to exist, participation therein can be shown by admissions.

Bartlett v. United States, 166 F. 2d 920 at 925 (10th Cir., 1948).

We understand this rule to apply to *participation in the agreement* to violate the law, because it is not necessary that each conspirator perform an act to further the objects of the conspiracy. It is sufficient if one overt act be performed by one of the conspirators. The others may have done nothing but enter into the agreement.

Marino v. United States, 91 F. 2d 691 at 694 (9th Cir., 1937).

Whether a person has entered into the agreement to violate the law or is merely associating with conspirators is a question of fact. And the proof may be direct or circumstantial—oral admissions being properly considered.

Marino, supra, at 694.

And either of two theories, supported by proof, are permissible to show liability to punishment as a principal. Theresa may be shown to be a party to the agreement or it is sufficient to show that she knowingly aided or abetted a conspirator in performance of an overt act.

Marino, supra, at 696.

As this court has stated:

“The knowledge of some of the conspirators as to the scope thereof may be limited. Knowledge of membership or division of spoils is immaterial. Nor need overt acts be in themselves substantive offenses. A person knowing of a conspiracy to violate the law, and knowingly assisting in any way in furthering such unlawful enterprise, is guilty. . . .”

Coates v. United States, 59 F. 2d 173 at 174 (9th Cir., 1932).

The conspiracy as to Theresa Martinez and Count IV as to both appellants will be discussed together.

Theresa and Gabriel T. Martinez were joint owners and co-occupants of the premises at 3040 Atwater Street. Theresa stated to the officers that she used the stove, did the cooking and used all of the kitchen utensils. Exhibit 4, a package of heroin capsules, was found in the kitchen in a box of oatmeal. Theresa had further stated she had seen Velli, Gavaldon and Campos fooling with a powdery substance on the kitchen table, she stated the package of heroin capsules found in the kitchen belonged to Velli, and she stated she had told Velli to get rid of these friends of his or they were all going to get into trouble. There were boxes of empty gelatin capsules open to view in the house and at one time Theresa tried to hide one. Balloons and fingerstalls were found in the kitchen, also tins of powdered milk sugar. Inferentially, Theresa was benefited financially by the traffic in narcotics. Although she was shown to have been a proprietor of a restaurant, it was small, with a capacity of only 12 customers, and this would hardly account for the affluence of the Martinez's in their ownership of the house, the two 1956 automobiles and the bank accounts.

There should be considered here the activity of the other defendants, prior to February 27, 1956, and on that day, which occurred at these premises. Inferentially, much of it would come to Theresa's attention.

Certain of Theresa's statements to the officers were both incriminatory and exculpatory. The jury would nonetheless be entitled to believe part and disbelieve the balance.

“Elwert argues that the jury could not believe that part of Hammond's testimony which helped the Government's case and fail to credit that part favorable to him. We do not agree. The jury may conclude

a witness is not telling the truth as to one point, is mistaken as to another, but is truthful and accurate as to a third.”

Elwert v. United States, 231 F. 2d 928 at 933-934 (9th Cir., 1956) and cases there cited.

The evidence is reasonably susceptible to the finding that Theresa had full knowledge of the use of her home as a center of traffic in narcotics. At the very least she must have known of its concealment on the premises which was one of the purposes of this conspiracy.

In a case very similar to this, as to the appellant Theresa, this court said:

“The court also instructed the jury that if appellant Gullo ‘gave the use of his premises for the landing or the storage of the alcohol, he assisted in the enterprise,’ and that it seemed to the court that it would not be a violent inference to infer that appellant Gullo had knowledge of the conspiracy. We believe the inference is correct. It is highly improbable that Gullo could permit such use of his premises, without knowing that the men who stored the alcohol had agreed to defraud the United States. Of course the court instructed the jury that his comment on the evidence was ‘in no sense controlling upon’ the jury.”

* * * * *

“As to Gullo, the evidence is meager, though we believe sufficient. It is true that: ‘The failure of a person to prevent the carrying out of a conspiracy, even though he has the power so to do, will not make him guilty of the offense without further proof that he has in some affirmative way consented to be a party thereto.’ *Weniger v. United States* (C. C. A. 9), 47 F. (2d) 692, 693. But here, Gullo permitted

his premises to be used for storage and the re-canning of alcohol. Such permission aided the purpose of the conspiracy, and as we have said, the jury could properly infer knowledge.

“We find no error affecting the substantial rights of appellants.”

Marino v. United States, 91 F. 2d 691 at 699;
Cert. denied as to Gullo in *Gullo v. United States*,
302 U. S. 764.

As to appellant Theresa Martinez, there have been cited a number of cases purporting to show that the foregoing evidence is insufficient to justify a conviction on the conspiracy count. We have no quarrel with the general statements of law quoted from these cases, but close analysis shows they are not analogous to this case on the facts or they found there was sufficient evidence for a conviction.

In *Dennert v. United States*, 147 F. 2d 286 (6th Cir., 1945), cited on page 17 of brief, the court's decision was based upon the lack of showing of knowledge on part of appellant and that the liquor was found on vacant portion of the premises.

In *Eng Jung v. United States*, 46 F. 2d 66 (3rd Cir., 1930), cited Ang (*sic*) Jung at page 17 of brief, the narcotics were found in the apartments of others, not even in constructive possession of the appellant.

In *United States v. Stoppenbeck*, 61 F. 2d 955 (2d Cir., 1932), no knowledge or possession was shown.

In *De Bonaventura v. United States*, 15 F. 2d 494 (4th Cir., 1926), the evidence was held sufficient and reversed because of instructions.

In *Chin Wah v. United States*, 13 F. 2d 530 (2nd Cir., 1926), cited on page 20 of brief, those defendants who had possession or knowledge were convicted of the conspiracy count as well as the substantive count.

The quoted portion from the case of *Butler v. United States*, 197 F. 2d 561 (10th C. C. A., 1952), which appears in the brief at pages 20 and 21, was from an instruction which had been refused although the court there states it is a correct general statement of law, though slanted slightly.

In *Bartkus v. United States*, 21 F. 2d 425 (7th Cir., 1927), the facts are entirely dissimilar. The material there dealt with was not contraband in any sense of the word and no knowledge that it was taken illegally was shown. In *Turcott v. United States*, 21 F. 2d 829 (7th Cir., 1927), the facts are not stated and it is submitted that the court in using the word "participation" meant a party to the agreement or aiding or abetting since it is well settled that every conspirator need not perform an overt act. In *McDaniel v. United States*, 24 F. 2d 303 (5th Cir., 1928), the evidence was held sufficient, the case was reversed on instructions. In *Sugarman v. United States*, 35 F. 2d 663 (9th Cir., 1929), no knowledge and no possession of the liquor were shown. In *Ventimiglio v. United States*, 61 F. 2d 619 (6th Cir., 1932), the court held there was a failure to prove knowledge of the illegal purpose of the others shown to be in the conspiracy. The *Weiniger* and *Marino* cases are cited above.

In respect to Count IV, the concealment of narcotics in the home of appellants, the statutory presumption set

forth in the last paragraph of Section 174 of Title 21, U. S. C., comes into full play. It reads:

“Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury:”

Both appellants were in constructive possession of the narcotics. Knowledge of the circumstances of its being there is shown above.

In *Brown v. United States*, 222 F. 2d 293 at 297, this court said:

“In *Mullaney v. United States*, 9 Cir., 1936, 82 F. 2d 638, 642, this court approved an instruction of the trial court that ‘possession of a thing means having in one’s control or under one’s dominion.’ It is not necessary that possession be immediate or exclusive. *Mullaney v. United States*, *supra*; *Borgfeldt v. United States*, 9 Cir., 1933, 67 F. 2d 967.”

Appellants last argument in respect to the sufficiency of the evidence is to the effect that the circumstantial evidence fails “to exclude a reasonable deduction of innocence equal in weight with the inference of guilt.”

This case is not wholly circumstantial. There was direct evidence of the joint ownership and joint occupancy of the house, of appellant Gabriel’s delivery and sale of heroin, of the concealment of heroin in the kitchen of the home. But even assuming that it was wholly circumstantial, without reiterating the evidence, we submit that there was substantial evidence upon which the case should go to the jury and that the inferences which could be

reasonably and properly drawn from the evidence excludes "a reasonable deduction of innocence."

In any event, this court does not appear to follow the rule announced in the cases cited by appellants on this proposition. Under proper instructions it is the jury's function to determine whether the inferences they believe flow from the evidence overcomes the presumption of innocence.

This court has said:

"It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence."

Stoppelli v. United States, 183 F. 2d 391 at 393 and cases there cited (9th Cir., 1950). Cert. denied 340 U. S. 864, and 340 U. S. 898.

To the same effect, citing *Stoppelli, supra*, with approval see: *United States v. Pesano*, 193 F. 2d 355 at 360 (7th Cir., 1951); *Remmer v. United States*, 205 F. 2d 277 at page 288 (9th Cir., 1953); *Charles v. United States*, 215 F. 2d 831 at 834 (9th Cir., 1954); *United States v. White*, 228 F. 2d 832 at 833 (7th Cir., 1956); *Elwert v. United States*, 231 F. 2d 928 at 933 (9th Cir., 1956).

B. The Search and Seizure.

1. The Entry of the Premises.

Federal officers are under the duty to enforce the criminal laws and in connection therewith they may make an arrest without a warrant for felonies committed in their presence or they may make such arrests upon reasonable cause that the person sought to be arrested has committed a felony.

Agnello v. United States, 269 U. S. 20;

Kathriner v. United States (9 Cir.), 276 Fed. 808;

Vachina v. United States (9 Cir.), 283 Fed. 35;

Bachenberg v. United States (9 Cir.), 283 Fed. 37;

Miller v. United States (9 Cir.), 9 F. 2d 382.

In the absence of a specific statute dealing with authority to arrest, the law determining the validity of an arrest by a federal officer without a warrant is the law of the state where the arrest occurs.

United States v. Di Re, 332 U. S. 581, at 589.

We have found no such statute in respect to agents of the Bureau of Narcotics for February, 1956.

The Penal Code of the State of California, Section 836, provides in pertinent part:

“Arrest by Peace Officers.

“A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

“1. For a public offense committed or attempted in his presence.

* * * * *

“3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

“4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.”

Section 844 of said Penal Code provides:

“To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.”

Narcotics Agents Jones and Gullon arrested defendants Hernandez and Gavaldon for the commission of a felony in their presence.

Upon their ascertaining that the package being transmitted from Gavaldon to Hernandez was an opium derivative [R. 150-151] and after hearing the conversation in Spanish to the effect that the appellant Gabriel T. Martinez was at the house (3040 Atwater) awaiting the return of Gavaldon with the money, and taking into consideration the information that had been given to them by Howe about the previous transactions involving the sale of heroin, such Narcotics Agents were justified and under the duty of making an immediate arrest of Gabriel T. Martinez as a principal to the transportation, concealment and sale of a narcotic which had occurred in the officers' presence.

In *People v. Maddox*, 294 P. 2d 6 (S. Ct. of Calif. in Bank, 1956), where an officer with probable cause to make an arrest knocked on the door of the defendant's home,

heard, "Wait a minute," and also heard "the sound of retreating footsteps," and thereupon kicked in the door and entered, the court held that the latter portions of Section 844 (above quoted) were inapplicable and "that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose," see page 9 of opinion.

To the same effect, see *People v. King*, 294 P. 2d 972 (Dist. Ct. of Appeal, Calif., 1956); *People v. Sayles*, 295 P. 2d 579 (Dist. Ct. of Appeal, Calif., 1956).

In a federal case decided before the *Di Re* case, *supra*, this court held that if an officer has reasonable cause to believe that the person to be arrested is inside a building or dwelling, he has authority, after identifying himself and demanding admittance, to break in, upon a refusal to admit him, to effect an arrest.

Mattus v. United States (9 Cir.), 11 F. 2d 503.

The officers' breaking and entering into the house at 3040 Atwater, Los Angeles, was under substantially identical circumstances to those of the *Mattus* case, *supra*, where the officers had identified themselves as Federal Narcotics Agents and demanded to be admitted and upon noncompliance had broken in. Such entry and subsequent arrest were upheld.

The evidence further shows that the officers' peril would have been increased or their arrest frustrated if they had taken the additional time to announce their purpose. Both officers heard the running of feet [R. 139, 180] and, as to Gullon, the door was being locked even as he demanded admittance [R. 179-180, 198].

2. The Search Incident to an Arrest.

The officers' original entry in the premises of 3040 Atwater having been lawful, notwithstanding that the person sought to be arrested was not there or had escaped, the officers were entitled to arrest any person on the premises that they had probable or reasonable cause to believe had committed a past felony or that they had reasonable or probable cause to believe was then committing a felony.

Mattus v. United States, supra;

Mullaney v. United States, 82 F. 2d 638;

Kwong How v. United States (9 Cir.), 71 F. 2d 71;

Carroll v. United States, 267 U. S. 132;

Brinegar v. United States, 338 U. S. 160;

Agnello v. United States, supra.

Agent Jones on entry recognized the defendant Campos as being the person who had on a prior occasion acted as lookout for the appellant Gabriel Martinez on an occasion when Gabriel Martinez had transported and delivered to the defendant Hernandez for Howe a quantity of heroin. Jones after identifying himself had attempted to place Campos under arrest in the house, which arrest was resisted until the officer used such force as was necessary to effect custody. Thereafter, the arrest of Campos was completed in the immediate vicinity of the dwelling at 3040 Atwater.

Pursuant and incident to a valid arrest a Federal Agent may make a search of the premises where the arrest is effected.

United States v. Rabinowitz, 339 U. S. 56;

Carroll v. United States, *supra*;

Brinegar v. United States, *supra*;

Agnello v. United States, *supra*.

And the fruits or evidence of the crimes may be seized incident to such arrest (Same cases as cited immediately above). The search may go beyond the immediate presence of the defendant and is not restricted to things open to sight.

Harris v. United States, 331 U. S. 145;

United States v. Rabinowitz, *supra*.

It is true that approximately thirty minutes elapsed between the entry and the beginning of the search, as asserted by appellants [R. 145-146, 148-149, 156, 181-183]. But this is not an unreasonable lapse of time, considering that one of the officers was chasing the man that had shot him [R. 144] and the other officer was securing help from local officers and also had the problem of watching over Campos, who was wounded and for whom an ambulance was called [R. 180-181].

And we submit that the officers' right to search the premises incident to the arrest of Campos is not affected because they thought "it was wise to ask the defendant . . . for permission to search" [R. 201].

And we further submit that the officers' right so to search was not affected by their forbearance until permission had been granted [R. 158]; this could have been

accidental or the result of intelligent desire to have more than one legal basis for the search. It appears to have been the latter [R. 201].

We quote from the *Brinegar* case, *supra*, in respect to probable cause and the duties of law enforcement officers under such circumstances as occurred in this case (p. 176):

“Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers’ whim or caprice.”

Page 179:

“Government agents are commissioned to represent the interests of the public in the enforcement of the law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation. This is increasingly true when the facts point directly to a crime in the course of commission in the presence of an agent. Prompt investigation may then not only discover but, what is still more important, may interrupt the crime and prevent some or all of its damaging consequences.”

A number of cases are cited by appellants as to the extent of a search (see p. 26 of brief). *United States v. Charles*, 8 F. 2d 302, set up the test as permitting the

search of a building in which a person is arrested to the extent of his control *and his activities* are likely to extend.

In this regard, we would again like to call to the court's attention the statement of Theresa Martinez, made during the course of the search, that she had seen Velli, Gavaldon and Campos fooling with a powdery substance on the kitchen table [R. 149]. After this statement the search of the kitchen would seem most reasonable. It should also be remembered that boxes of gelatin capsules were open to view in the home [R. 196].

In another case cited by appellants, *Shew v. United States*, 155 F. 2d 628, a search of a smoke house some twenty feet from the point of arrest was permitted, the court saying "the search can [cover] all parts of the premises used for the unlawful purpose," see page 630. Cert. denied 328 U. S. 870.

3. The Consent of Theresa Martinez.

Notwithstanding the officers' right to make a search of the premises incident to arrest they secured in addition thereto the consent of a co-occupant of such premises. Consent of a joint occupant or a joint owner is sufficient for all.

Stein v. United States (9 Cir.), 166 F. 2d 851,
cert. den. 344 U. S. 844;

Raine v. United States, 299 Fed. 407, cert. den.
266 U. S. 611;

United States v. Sferas (7 Cir., 1954), 210 F. 2d
69 at 74.

The above cases were decided subsequent to *Amos v. United States*, 255 U. S. 313, cited by appellants, and are distinguishable because the *Amos* case did not decide a

wife could not give a valid consent to a search. The court expressly left that question open, see page 317 of the opinion. In *Amos* there was no consent, nor did the Government argue there was. The officers there advised the woman they were going to search, and she gave way without saying anything.

We concede in this discussion that a consent to search must be intelligently and voluntarily given and that there must not be any element of fraud in securing the consent nor any use of force.

Appellants cite a great many cases setting forth the proposition that a consent given in the face of armed intrusion is suspect and the Government has the burden of proving a real consent. We have no quarrel with this position—it just doesn't apply to the peculiar circumstances of this case.

The entry here was legal and was to effect an arrest. Because of the necessity of other activity some thirty minutes expired before consent to search was requested. There isn't any evidence that the officers were still displaying their weapons at that point. There is no evidence that they used any force or any subterfuge to get a consent to the search. In fact the evidence is quite to the contrary. Gullon asked for permission to search room by room and in both English and Spanish [R. 183]. Other officers heard the consent asked for and given [R. 147, 208]. Theresa was not reticent about talking. She made statements about her husband and Campos and Gavaldon which were quite revealing in respect to their criminal activities. She is not shown to be the proverbial timid housewife type, but the proprietor of a small business. Presumptively she knew what her rights were.

We suggest that her denial of consent was an afterthought. In this regard it is to be noted that her denial is in the most general terms in an affidavit as follows:

“That on February 27, 1956, Federal narcotics agents * * * without a search warrant being served or displayed and without her permission, forcibly entered the home of defendants * * * and removed therefrom certain substance * * *” [R. 11].

“* * * that the house and car was entered and searched without a search warrant and without her sanction and waiver of constitutional rights. * * *” [R. 12].

These are merely conclusions. A similar situation was considered in *United States v. Mitchell*, 322 U. S. 65 at pages 69 and 70 with footnote No. 2. Theresa Martinez did not take the stand at the hearing on the motion to suppress nor at the trial. Nowhere in this record does it appear from her that she was overreached, coerced or intimidated. The evidence is to the contrary. It is shown that she was cooperative [R. 183] and her frequent attempts to put the blame on the other defendants substantiates this evaluation.

Appellants place great stress upon *Higgins v. United States*, 209 F. 2d 819 (D. C. Cir., 1954) and its holding that no sane man would consent to a search if discovery of contraband were certain to follow. But the court there qualifies its remarks: “. . . at least in the absence of some extraordinary circumstance, such as ignorance that contraband is present.” (See p. 820.)

We submit that the evidence here shows such extraordinary circumstances.

Apart from the obvious explanation that Theresa Martinez was attempting to put the blame on the others and bluff it out for herself, there is an explanation shown by the evidence which makes the reasoning of *Higgins* case wholly inapplicable to the consent given in this instance.

On February 27, 1956, just before Hernandez's telephone call, Howe told him he wanted one-half ounce of heroin and Hernandez said he would get it for him [R. 90]. The chemist pointed out that an avoirdupois ounce contained $437\frac{1}{2}$ grains [R. 222]; therefore a half ounce would be $218\frac{3}{4}$ grains. The chemist also testified that Exhibit 3, recovered in the street, and Exhibit 4 found in the kitchen, came from a common source by reason of exactly identical chemical properties and appearance [R. 221]. They were also packaged in the same way, being gelatin capsules wrapped in balloons.

The chemist further testified *to the effect* that their combined weight before analysis was 215 to 224 grains [R. 222-223], very nearly one-half an ounce which would be $218\frac{3}{4}$ grains.

We suggest that after Hernandez's call came to the house advising that a purchaser for one-half ounce was waiting, that this quantity was made up for delivery. Then either part of the total to be delivered was left behind accidentally, or Gavaldon, the deliveryman, decided to "short change" the buyer.

Theresa Martinez could well have believed that the half ounce was out in the street being delivered and none remained behind in her kitchen.

Lastly, implicit in the trial court's order denying the appellants' motion to suppress, made both before and during trial, are findings that the search of these premises was legal and not in violation of the appellants' constitutional rights. Such findings should be sustained unless clearly shown to be erroneous as a matter of law.

United States v. Gypsum Co., 333 U. S. 364 at 394-395 (1948).

See also:

United States v. Mitchell, 322 U. S. 65 at 69-70 (1944).

C. Proof and Pleading of Overt Act.

Proof of a single overt act is sufficient to sustain a conviction under a conspiracy count.

Marino v. United States, 91 F. 2d 691 at 694 (9th Cir., 1937).

The first overt act charged in the indictment is as follows:

“(1) On or about February 27, 1956, defendant Joel Hernandez had a conversation with Jack C. Howe at 151 North Boylston Street, Los Angeles, California, where he received from Jack C. Howe \$140.00;”

We have already discussed the evidence as to the conspiracy and Hernandez's part therein. It is clear from the evidence that Howe met Hernandez at 151 North

Boylston Street [R. 89-90, 129-130]. It is also clear that they had a conversation which must have commenced at the time of their meeting [R. 90]. The \$140.00 was shown to Hernandez but actually delivered a few minutes later at Atwater and Fletcher Streets in Los Angeles [R. 90]. This money was obviously for the purchase of narcotics and was later found partly on Gavaldon as previously stated.

The only variance between pleading and proof is as to the place of delivery of the money.

In a case almost identical hereto, as to the variance, where a sale of illicit liquor was pleaded to have occurred "at the northeast corner of Clay and Kearney Streets" in San Francisco, but the proof was that the delivery of the liquor and payment of the money was elsewhere, this court held there was no material or fatal variance.

McDonough v. United States, 299 Fed. 30 at 39-40 (9th Cir., 1924).

In any event, appellants have failed to show how they were prejudiced by what variance did exist here.

See:

United States v. Ragen, 314 U. S. 513 at 526;

Berger v. United States, 295 U. S. 78 at 81-82;

Smith v. United States, 50 F. 2d 46 at 47 (8th Cir., 1931);

Federal Rules of Criminal Procedure, Rule 52(a).

Conclusion.

We submit that the constitutional rights of the appellants were not violated by the search and seizure, because it was incident to a valid arrest and was consented to by an owner of the premises; that the variance between pleading and proof was immaterial and not prejudicial to the appellants; that there is sufficient and substantial evidence to warrant the judgments of conviction entered herein.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Chief of Criminal Division,
Asst. United States Attorney,

ROBERT JOHN JENSEN,
Asst. United States Attorney.
Attorneys for Appellee.

No. 15173

In the
United States Court of Appeals
For the Ninth Circuit

GABRIEL T. MARTINEZ and THERESA MARTHA MARTINEZ, <i>Appellants,</i>	}
vs.	
UNITED STATES OF AMERICA, <i>Appellee.</i>	

Appellants' Closing Brief

HAROLD J. ACKERMAN
SAM BUBRICK
322 North Avenue 19
Los Angeles 31, California
Attorneys for Appellant

FILED

MAR 13 1957

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	Page
A. Sufficiency of the evidence against Gabriel T. Martinez	1
B. Sufficiency of the evidence against Theresa Martinez	3
C. Knowledge and participation of Theresa Martinez in the conspiracy	5
D. "Constructive possession" as proof of possession and the presumption contained within Section 174 of Title 21, United States Constitution.....	6
E. The consent of Theresa Martinez.....	8
F. Pleading and proof of Overt Act.....	10

TABLE OF CASES AND AUTHORITIES CITED

Cases

Beland vs. U. S., 117 F. 2d 958 at 959.....	4
Brown vs. U. S., 222 F. 2d 293 at 297.....	6
Eng Jung vs. U. S., 46 F. 2d 66 at 67.....	7
Higgins vs. U. S., 209 F. 2d 819.....	8
Marino vs. U. S., 91 F. 2d 671 at 694.....	5
Morei vs. U. S., 127 F. 2d 827 at 835-6.....	4
Quong Mow vs. U. S., 13 F. 2d 120.....	4
Thomas vs. U. S., 57 F. 2d 1039.....	4
U. S. vs. Bonanzi, 94 F. 2d 570 at 572.....	4
U. S. vs. Cohen, 197 F. 2d 26.....	4

Authorities

Overt Act	10
United States Constitution, Title 21, Section 174.....	6



In the
United States Court of Appeals
For the Ninth Circuit

<div style="border: 1px solid black; padding: 5px;"><p>GABRIEL T. MARTINEZ and THERESA MARTHA MARTINEZ, <i>Appellants,</i></p><p style="text-align: center;">vs.</p><p>UNITED STATES OF AMERICA, <i>Appellee.</i></p></div>	}	No. 15173
---	---	-----------

Appellants' Closing Brief

Appellants in this closing brief will seek to touch upon the main issues as responded to by appellee in the Appellee's Brief.

A.

**SUFFICIENCY OF THE EVIDENCE AGAINST
GABRIEL T. MARTINEZ**

Appellee urges that the evidence against Appellant Gabriel T. Martinez is sufficient to sustain the convictions. Appellee argues (p. 17) that the jury could properly infer that Gabriel T. Martinez was present at 3040 Atwater Street on February 27, 1956, because there was a great deal of confusion and Martinez had he been there would have had time to run away.

It must be carefully noted that a man did leave the window, shot one of the officers and escaped. But this is not the man appellee has reference to, for this man was seen face to face by the officer and was described as "unknown" and "whose identity is still unknown" (RT 142).

What appellee is arguing is that someone could have (Gabriel T. Martinez) left before this "unknown" man. The officer was asked if he saw Gabriel T. Martinez come out of the house at any time and the officer stated he did not (RT 159). Appellee is using a hypothetical example of possibilities to establish evidence, not facts. There was no evidence and the officers do not even suggest that someone else left before the unknown man. This appellant submits is pure conjecture in a vain attempt to place Gabriel T. Martinez in the house on February 27, 1956.

B.**SUFFICIENCY OF THE EVIDENCE AGAINST
THERESA MARTINEZ**

Appellee's Brief (p. 22) recites certain evidence from which appellee concludes (p. 23):

"The evidence is reasonably susceptible to the finding that Theresa had full knowledge of the use of her home as a center of traffic in narcotics. At the very least she must have known of its concealment on the premises which was one of the purposes of this conspiracy."

Appellee recites, in substance, the following facts (Appellee's Brief, p. 22) to support this conclusion:

"Theresa used the kitchen and utensils for cooking. Heroin was found in an oatmeal box. Theresa has seen the others fooling with a powdery substance. There were capsules, balloons and powder milk sugar in the kitchen. Theresa was inferentially financially benefited by the narcotic traffic."

The weight to be attached to the above evidence is, it is respectfully submitted, not sufficient upon which to sustain a finding of guilty in a criminal charge.

The problem which appellee has to face is this: some incriminatory or connecting facts must be found which would demonstrate that Theresa Martinez was a member of the conspiracy or had knowledge thereof and aided in their transactions and concealment of the narcotics.

The fact Theresa Martinez used the kitchen and did the cooking is not incriminatory. The fact Theresa Martinez had seen others fooling with a powdery substance does not show she participated in their activities. The fact she may have been incidentally a financial beneficiary is not only remote but proves nothing as to her knowledge or participation.

While it is true it is the whole of the evidence and the inferences that may be drawn from this totality upon which the jury are permitted to draw their conclusions the outstanding fact in the evidence is that there is absolutely no showing Theresa Martinez did anything to participate or aid in the conspiracy or charges. She was not shown to know there were narcotics in the house. She was not shown to know of any of the transactions. The only conclusion is that there is a suspicion she may have benefited financially in some indirect way, but as to her having done one single thing to aid or participate the evidence is completely lacking. (Cf. *U. S. vs. Cohen*, 197 F. 2d 26 re appellant Ona Valker on page 29 thereof).

In similar cases the court has typed such evidence "conjecture and suspicion," *Beland vs. U. S.*, 117 F. 2d 958 at 959; "allegedly insinuating circumstances", *Morei vs. U. S.*, 127 F. 2d 827 at 835-6; "colorless evidence", *U. S. vs. Bonanzi*, 94 F. 2d 570 at 572, and "as a strong suspicion", *Quong Mow vs. U. S.*, 13 F. 2d 120.

In *Thomas vs. U. S.*, 57 F. 2d 1039 confronted with facts which showed Simmons was the brother-in-law of Gorges (a conspirator). Simmons was frequently

seen in his company and knew of the conspiratorial arrangement. The court stated (p. 1042):

“Mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy without agreement to cooperate to accomplish such object or purpose is not enough to constitute one a party to a conspiracy.”

C.

KNOWLEDGE AND PARTICIPATION OF THERESA MARTINEZ IN THE CONSPIRACY

To support the conviction of Theresa Martinez, appellee relies (pp. 23-24) upon *Marino vs. United States*, 91 F. 2d 671 at 694 as illustrative of the law and analogous to the facts of this case (Appellee's Brief, pp. 21, 23-24).

Appellants respectfully submit that the *Marino* case, supra, is completely distinguishable. In the *Marino* case one Gullo was present and had openly permitted his ranch to be used to store and recan alcohol. The question before the court was were these established facts sufficient to draw an inference that Gullo knew there was a conspiracy to defraud the government of its tax on alcohol. The court said:

“But here, Gullo permitted his premises to be used for storage and recanning of alcohol. Such permission aided the purpose of the conspiracy and as we have said the jury could properly infer knowledge.”

In the instant case herein there was no necessity for seeking permission from Theresa Martinez to use the premises. She lived there and operated a small business in the business section of Los Angeles. What others did in the house did not necessitate her consent and certainly not her participation. That was their business and as she said:

“I might do a lot of things, but narcotic’s is out of the question.” (RT p. 148).

D.

“CONSTRUCTIVE POSSESSION” AS PROOF OF POSSESSION AND THE PRESUMPTION CONTAINED WITHIN SECTION 174 OF TITLE 21, UNITED STATES CONSTITUTION.

Appellee argues (p. 26) that both appellants were in constructive possession of the narcotics and appellee cites *Brown vs. United States*, 222 F. 2d 293 at 297 for the effect that the important element of possession is dominion and not that the possession be immediate or exclusive.

The *Brown* case, *supra*, involved a defendant whose activity was personally making the necessary arrangements for delivery of narcotics by others. Such facts showed control, though, the defendant never had the narcotics on his person. The case held nothing as to the application of the constructive possession doctrine as it pertains to ownership of premises.

Appellants have searched the cases for any pronouncement that mere ownership of premises supports an inference that all items contained herein are, within the purview of the statute, in "possession" of the owners. The only case found that mentions the words "constructive possession" in a criminal case is *Eng Jung vs. U. S.*, 46 F. 2d 66 at 67. In the *Eng Jung* case the court held narcotics found in the apartment of tenants was not in the constructive possession of the landlord.

It may be that ownership of premises is one item of circumstantial evidence that added to other facts would support an inference of possession of items found therein but here there is little weight to that circumstance because the house was occupied by at least five persons during the period in question.

E.

THE CONSENT OF THERESA MARTINEZ

Appellee argues (pp. 36-38) that the reasoning of the case of *Higgins vs. U. S.*, 209 F. 2d 819 cited by appellants in their opening brief does not apply, because the *Higgins* case said no sane man would consent to a search if narcotics were present *at least in the absence of some extraordinary circumstances*. (Emphasis mine.) *Higgins*, supra, was cited for its reasoning that no consent would logically be given if narcotics were known to be present. Appellee argues that Theresa Martinez might have thought the narcotics were all gone, because one-half ounce was ordered and the combined weight of that found in the house and that delivered was approximately one-half ounce. (Appellants' counsel acknowledges his error in mathematics in adding 174 plus 29 plus 3 to add to 204 (correct 206) Appellants' Opening Brief, pp. 12-15). Appellee then reasons that Theresa Martinez could have believed that one-half ounce was out in the street being delivered and none was left in the house.

This assumes first that Theresa Martinez was home at that time. The officer testified he was watching the house before the delivery by Gavaldon (RT 131, 133, 135) and her automobile was first noticed as he decided to effect an entry (after Gavaldon's departure and arrest) (RT 159-160).

Appellant admits this is not conclusive as defendant Gavaldon testified Theresa Martinez arrived home

about 12:35 (RT 254) and the officers entered about 2:45 (RT 146).

Appellee assumes that Theresa Martinez would know about the order for one-half ounce of narcotics, but would then be unaware of the actual amount delivered because a portion was left behind accidentally or designedly by Gavaldon. Appellant respectfully submits this reasoning is "stretching things a little too far". This reasoning assumes she was home, assumes she knew about the telephone conversation, assumes she knew that Gavaldon had narcotics and assumes she believed there were no other narcotics. All the evidence shows is Theresa Martinez consented to the search because she either didn't know if there were narcotics or she submitted to the continuing implied threat of physical force previously demonstrated.

F.

PLEADING AND PROOF OF OVERT ACT

Appellee argues (pp. 38-39) that the first overt act pleaded was proved except for an immaterial variance. What appellee has not answered is appellants' contention that the overt act pleaded must in some way be in aid of or perpetration of the objects of the conspiracy. The first overt act charged is in substance that Hernandez received money from Howe to purchase narcotics. How this aids or furthers the conspiracy is not shown. Appellee states "We have already discussed the evidence as to the conspiracy and Hernandez's part therein."

The record shows Hernandez pleaded guilty to Counts II and III and was not tried on Count I the conspiracy charge. This proves nothing, but the evidence shows as to Hernandez that he purchased narcotics for himself and Howe and was not a member of the conspiracy to deliver narcotics for the co-conspirators. The question remains unanswered as to how this overt act fits into the conspiracy.

Respectfully submitted,

HAROLD J. ACKERMAN,
SAM BUBRICK,
Attorneys for Appellants.

No. 15176

In the
United States Court of Appeals
For the Ninth Circuit

MAURICE PENN,

Appellant,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of
L. R. MAHAN, also known as LEMUEL ROSS
MAHAN,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION.

Appellant's Opening Brief

JOSEPH W. FAIRFIELD
ETHELYN F. BLACK
MAX H. GEWIRTZ
6399 Wilshire Boulevard
Los Angeles 48, California
Attorneys for Appellant

FILED

SEP 28 1956



TOPICAL INDEX

	Page
Preliminary Statement	1
Statement as to Jurisdiction	2
Facts	2
Questions for the Appellate Court.....	4
Point I. The trustee in bankruptcy failed to sustain the Burden of proof that the chose in action had no value	5
Point II. The order granting the petition that the levy of attachment is void and of no effect should be reversed	9

TABLE OF CASES AND AUTHORITIES CITED

Cases

	Page
Cooper, In re, (Dist. Ct. Mass.) 12 Fed. 2d 485.....	7
Dockery v. Flanary, (Sup. Ct. Va.) 73 S.E. 2d 375, 377	5
First National Bank v. Wyoming Valley Ice Com- pany (Dist. Ct. Pa.) 136 Fed. 466.....	7
Gomez v. Cecena, 15 Cal. 2d 363, 366 (101 P. 2d 477)	6
Graves, In re, 27 Fed. Supp. 717, 718.....	5
Houghton Wool Co. v. Morris (C.C.A. 1) 249 Fed. 434	7
Hutchison v. Holland, 47 Cal. App. 710, 712 (190 P. 1072)	6
Hynes v. White, 47 Cal. App. 549, 552 (190 P. 836)	6
Lee Sing Far v. U.S., 94 Fed. 834.....	6
Mandel, In re, 127 Fed. 863; affmd. 135 Fed. 1021.....	6
Mantonya v. Bratlie, 33 Cal. 2d 120, 127 (199 P. 2d 677)	6
Moffit v. Dennitson, (Sup. Ct. Iowa) 294 N.W. 731, 734	5
Sample v. Jackson, (Sup. Ct. N.C.) 26 S.E. 2d 876, 879	5
United States v. Hark, 320 U.S. 531, 534; 64 S. Ct. 359, 361	5

Authorities

Bankruptcy Act, Section 67a (11 U.S.C.A. 107).....	2, 3
Wigmore on Evidence, 2nd Edition, Section 2034.....	6

In the
United States Court of Appeals
For the Ninth Circuit

MAURICE PENN,

Appellant,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of
L. R. MAHAN, also known as LEMUEL ROSS
MAHAN,

Appellee.

No. 15176

Appellant's Opening Brief

Preliminary Statement

This is an appeal by the petitioner, Maurice Penn, from an order of the Hon. Ben Harrison, entered on or about the 10th day of May, 1956, affirming the order of the Hon. Joseph J. Rifkind, Referee in Bankruptcy, made and entered on or about the 20th day of February, 1956, in favor of the trustee and against the petitioner (Tr. of Rec. p. 51) which determined that a levy of attachment issued out of the Municipal Court in that certain action entitled Maurice Penn v. L. R. Mahan on certain real property owned by the bankrupt was

void and of no effect as against the trustee in bankruptcy (Tr. of Rec. p. 25). The order of the Referee in Bankruptcy (Tr. of Rec. p. 25) is also brought up for review on this appeal (Tr. of Rec. p. 52).

Statement as to Jurisdiction

Maurice Penn commenced an action against the bankrupt, L. R. Mahan, in the Municipal Court of the City of Los Angeles, State of California, on or about the 16th day of September, 1953, and caused an attachment to be issued and levied on that certain real property described as Lot 28, in Tract No. 8970, as per map recorded in book 117, pages 43-44 of Maps, which property was owned by the bankrupt. Proceedings were commenced by the Trustee in Bankruptcy to set the said attachment aside on the grounds that it was a lien obtained by attachment within four months before the filing of the Petition in Bankruptcy by the bankrupt (Tr. of Rec. p. 17). This Court can entertain such a proceeding pursuant to §67a of the Bankruptcy Act [11 U.S.C.A. 107], and jurisdiction of this Court is based on said section.

Facts

The appellant herein, Maurice Penn, caused an attachment to be levied in Municipal Court Case No. 124,775 entitled Maurice Penn v. L. R. Mahan, on certain real property described as Lot 28, Tract 8790, as per map recorded in Book 117, pages 43-44 of Maps, Records of Los Angeles County, State of California (Finding of Fact No. II; Tr. of Rec. p. 23). An order

adjudicating L. R. Mahan as a bankrupt was entered on or about the 16th day of October, 1953 (Finding of Fact No. I; Tr. of Rec. p. 23; pp. 7-8). On the 7th day of December, 1955, the trustee filed its petition alleging that at the time of the said levy of attachment the bankrupt was actually insolvent and that by virtue of the provisions of §67a [11 U.S.C.A. 107] of the Bankruptcy Act said levy of attachment and subsequent judgment lien were void and of no effect as against either the trustee in bankruptcy or the bankrupt estate (Tr. of Rec. pp. 17-18) which allegation was duly denied by the respondent in its Answer to the Petition (Tr. of Rec. p. 19). The issues thus being framed, the sole question posed to the court was the insolvency of the bankrupt at the time of the levy of the attachment (Tr. of Rec. p. 29).

In determining the solvency of the bankrupt on the 16th day of September, 1953, consideration must be given to whether the chose in action in the sum of \$81,719.61 was worth that amount.

The trustee then produced as a witness Grace Mahan, the wife of the bankrupt (Tr. of Rec. p. 29) who testified that a cause of action against the Seaboard Finance Company based on usury had been filed on September 16th, 1953, claiming damages in the total amount of \$81,719.61 (Tr. of Rec. p. 36; p. 42). The witness and her husband felt that the Seaboard Finance Company was indebted to them for that amount (Tr. of Rec. p. 42; p. 43). This was the only testimony produced by the trustee to support his allegation that the

bankrupt was insolvent at the time of the levy of the attachment. The only other evidence in the record relating to the value of this chose in action was the schedules (Tr. of Rec. pp. 5-7) verified by the bankrupt as part of an accurate inventory of his property (Tr. of Rec. p. 4, Paragraph IV).

From all of this the Referee found that the alleged claim for usury in the sum of \$81,719.61 was inchoate and uncertain in character and amount and had no appreciable value and concluded that the bankrupts were actually insolvent under the provisions of §67a of the Bankruptcy Act and voided the attachment and the subsequent judgment lien (Tr. of Rec. pp. 24-25).

Questions for the Appellate Court

Appellant concedes that upon evidence properly submitted a Referee in Bankruptcy may evaluate a chose in action at a figure less than that claimed by the bankrupt. Appellant insists, however, that it is incumbent upon the trustee in bankruptcy to present evidence and sustain its burden of proof as to the value of a chose in action.

The sole question submitted to this Court, therefore, is whether the Trustee in Bankruptcy sustained his burden of proving that the usury claim of \$81,719.61 was inchoate and uncertain in character and had no appreciable value. It is the position of the appellant that the trustee in bankruptcy did not sustain his burden of proof and the petition should therefore be dismissed.

Point I

The Trustee in Bankruptcy Failed to Sustain the Burden of Proof that the Chose in Action Had No Value

At the hearing before the Hon. Joseph Rifkind, Referee in Bankruptcy, Grace Mahan testified that a cause of action was in existence on September 16th, 1953, against Seaboard Finance Company based on usury in the sum of \$81,719.61 (Tr. of Rec. p. 36) and that in her opinion it was a valid and good cause of action as far as she and her husband were concerned (Tr. of Rec. pp. 42-43).

The trustee contends that since this claim against Seaboard is a lawsuit, its value as an asset should be discounted (Tr. of Record. p. 46). In thus arguing the trustee overlooks the fact that the burden of proof is upon him to establish that this claim has no value and not upon the petitioner to supply evidence as to the lawsuit's actual value. (*In re Graves*, 27 Fed. Supp. 717, 718; *Dockery v. Flanary*, (Sup. Ct. Va.) 73 S.E. 2d 375, 377; *Sample v. Jackson* (Sup. Ct. N.C.) 26 S.E. 2d 876, 879; *Moffit v. Dennitson*, (Sup. Ct. Iowa) 294 N.W. 731, 734).

The argument of the trustee that until a judgment has been rendered a cause of action has no value at all and that the court can entirely disregard it (Tr. of Rec. p. 46) is, of course, not correct. A judgment is merely the judicial determination of a claim by a court upon a matter within its jurisdiction (*U.S. v. Hark*, 320 U.S. 531, 534; 64 S. Ct. 359, 361). It is a matter of common knowledge that not all judgments are reducible to cash.

Equally well known is the axiom that a claim against a substantially solvent defendant has greater value than an uncollectable judgment.

In the case at bar the action had been pending prior to the levy of attachment (Tr. of Rec. p. 36). If at the date of the hearing, December 28, 1955, 2 years later (Tr. of Rec. p. 28) the litigation had not been tried and disposed of, the fault lies with the bankrupt and the trustee for not diligently prosecuting the same. No reason is given why those charged with pursuing the litigation did not do so with all haste and dispatch (Tr. of Rec. p. 47).

In determining the value of the chose in action we have only the testimony of Mrs. Mahan (Tr. of Rec. pp. 36, 42, 43) and the verified schedules that it was valued in the sum of \$81,719.61 (Tr. of Rec. p. 7). (*In re Mandel*, 127 Fed. 863; affirmed 135 Fed. 1021). No testimony was introduced by the trustee as to any other valuation. The testimony of this witness is not so improbable that it cannot be accepted as evidence. In any event, it was uncontradicted and testimony not improbable and uncontradicted must be accepted as true by the court. (*Hynes v. White*, 47 Cal. App. 549, 552, [190 P. 836]; *Hutchison v. Holland*, 47 Cal. App. 710, 712, [190 P. 1072]; *Gomez v. Cecena*, 15 Cal. 2d 363, 366, [101 P. 2d 477]; *Mantonya v. Bratlie*, 33 Cal. 2d 120, 127, [199 P. 2d 677]; *Lee Sing Far v. U.S.*, 94 Fed. 834; Wigmore on Evidence, 2nd Edition, §2034. Under such circumstances the Court may not disregard such evidence. Furthermore there is *no* evidence upon which the referee could have made a contrary finding.

The cases cited by the Referee in its memorandum opinion (Tr. of Rec. p. 22) do not hold a contrary view, but actually support appellant's position that the *burden of proof* is upon the trustee to establish the value of a claim before the Referee can make a finding as to its worth.

In *First National Bank v. Wyoming Valley Ice Company* (Dist. Ct. Pa.) 136 Fed. 466, the respondent argued that certain bonds totaling \$90,000.00 and set up as a liability were invalid; and that if you subtract this sum of \$90,000.00 from the liabilities, the assets would exceed the liabilities and there would be no insolvency. The respondent insisted that these bonds were invalid because there was no compliance with certain state requirements. The court there held that the question of the irregularity was one that only the state authorities could take advantage of and as a result respondent failed to sustain the burden of proof that these bonds were invalid.

In *Houghton Wool Co. v. Morris* (C.C.A. 1) 249 Fed. 434, the Referee found that the bankrupt was insolvent, the court saying on page 435:

“That there was sufficient evidence to support these findings is not disputed.”

In *Re Cooper*, (Dist. Ct. Mass.) 12 Fed. 2d 485, involved a cause of action for breach of contract growing out of a transaction relating to reorganization of the bankrupt's business; that the agreement itself was for some indefinite undertaking to furnish financial

assistance. In this case the bankrupt himself admitted that the claim was not seriously considered by him (pp. 485-486). The court there said on page 486:

“The test seems to be whether the claim is one that can be rendered available for the payment of debts within a reasonable time.”

In the case at bar the only testimony is that Mrs. Mahan considered seriously this chose in action and felt that the Seaboard Finance Company was actually indebted to the bankrupt in the sum of \$81,719.61 (Tr. of Rec. pp. 42-43). Moreover, it is because of the laches of the bankrupt and the trustee that this lawsuit was not tried long before the hearing of the petition. In the normal course of events the lawsuit would have been adjudicated and a determination had whether recovery on the claim would have rendered sufficient funds available for the payment of debts. As a matter of equitable principles the trustee in bankruptcy should not be permitted to remain idle more than two years and then without producing any evidence whatsoever argue that a chose in action is valueless.

Point II

**The Order Granting the Petition that the Levy of
Attachment Is Void and of No Effect Should Be
Reversed.**

Respectfully submitted,

JOSEPH W. FAIRFIELD

ETHELYN F. BLACK

MAX H. GEWIRTZ

Attorneys for Appellant

No. 15176.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAURICE PENN,

Appellant,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of L. R.

MAHAN, also known as LEMUEL ROSS MAHAN,

Appellee.

APPELLEE'S ANSWERING BRIEF.

FRANK M. CHICHESTER,
453 South Spring Street,
Los Angeles 13, California,
Attorney for Appellee.

FILED

OCT 16 1956

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Preliminary statement	1
Question presented	1
Point One. The determination of insolvency is one of fact to be determined by the trier of facts.....	2

TABLE OF AUTHORITIES CITED

CASES	PAGE
Cooper, Matter of, 12 F. 2d 485, 7 A. B. R. (N. S.) 643.....	3
First National Bank v. Wyoming Ice Co., 14 A. B. R. 448, 136 Fed. 466.....	2
Houghton Wool Co. v. Morris, 41 A. B. R. 271, 249 Fed. 434....	3
STATUTES	
Bankruptcy Act, Sec. 1(19).....	2
United States Code, Title 11, Sec. 1(19).....	2
TEXTBOOK	
1 Collier on Bankruptcy (14th Ed.), pp. 77-78.....	2

No. 15176.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAURICE PENN,

Appellant,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of L. R.
MAHAN, also known as LEMUEL ROSS MAHAN,

Appellee.

APPELLEE'S ANSWERING BRIEF.

Preliminary Statement.

The preliminary statement as set forth in appellant's opening brief correctly states the facts that are pertinent to this appeal. The statement as to jurisdiction is also correct. The facts as outlined by the appellant are essentially correct with the exception that the husband of the witness referred to did not testify in the proceedings before the referee in bankruptcy.

Question Presented.

The sole question to be determined by this Court is whether the bankrupt was insolvent on or about September 16, 1953, the date of the levy of attachment in question.

POINT ONE.

The Determination of Insolvency Is One of Fact to Be Determined by the Trier of Facts.

Insolvency is defined in Section 1(19) of the Bankruptcy Act (11 U. S. C. Sec. 1(19)). That definition follows:

“A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a *fair valuation* be sufficient in amount to pay his debts.” (Emphasis added.)

The cases wherein the matter of the determination of the insolvency of a person is involved are usually where an involuntary petition in bankruptcy has been filed against an individual and the matter of determining the solvency or insolvency of that individual must be found by the Court. The fourteenth edition of Collier on Bankruptcy, volume 1, pages 77 and 78, has this to say on the point involved before the Court:

“Where the validity of a note or account is seriously disputed some Courts have heavily discounted it in arriving at a valuation; others, presumably unwilling to go into collateral issues have allotted no value to it.”

In the case of *First National Bank v. Wyoming Ice Co.* (D. C. Pa.), 14 A. B. R. 448, 136 Fed. 466, a contested lawsuit was alleged to be an asset. The Court refused to give it any value in determining the matter of insolvency.

In the case of *Houghton Wool Co. v. Morris* (C. C. A. 1), 41 A. B. R. 271, 249 Fed. 434, an alleged asset was a claim that might be a valid claim after protracted litigation. The Court refused to consider it as an asset in determining the question of insolvency.

In the *Matter of Cooper* (D. C. Mass.), 12 F. 2d 485, 7 A. B. R. (N. S.) 643, the Court held that a doubtful and disputed claim for unliquidated damages resulting from breach of contract should not be considered as an asset in determining whether the alleged bankrupt was insolvent. At page 486 the Court used the following language:

“The test seems to be whether the claim is one that can be rendered available for the payment of debts within a reasonable time.”

At the time of the hearing before the referee the alleged usury action referred to in the schedules of the bankrupt had been pending since September, 1953, and was still not at issue. Certainly this is not the type of claim that can be rendered available in cash for the payment of debts within a reasonable time.

The appellant strongly contends that the appellee has failed to sustain the burden of proof of insolvency of the bankrupt on the date of the attachment. Reference is made by the appellant to the testimony of the wife of the bankrupt to the effect that she felt that the Seaboard Finance Company was indebted to her in the amount of some \$81,000.00. [Tr. of Rec. pp. 42-43.] It should be remembered that there was introduced into evidence the schedules filed by the bankrupt from which it appeared that without the claim based upon usury, the bankrupt was hopelessly insolvent on September 16, 1953, the date of attachment. [Tr. of Rec. p. 13.]

It was the duty of the referee as the trier of facts to give such weight to the testimony of the wife of the bankrupt as he should deem fit. From the conclusion of the referee, affirmed by the District Court, it appears that the testimony of the witness concerning the value of the usury claim was rejected in whole and the referee relied upon the authorities cited above in determining that the bankrupt was actually insolvent on the date of attachment.

It is respectfully submitted that the order of the District Court affirming the order of the referee should be affirmed.

Respectfully submitted,

FRANK M. CHICHESTER,

Attorney for Appellee.

No. 15176

In the
United States Court of Appeals
For the Ninth Circuit

MAURICE PENN,

Appellant,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of
L. R. MAHAN, also known as LEMUEL ROSS
MAHAN,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION.

Petition for Rehearing

JOSEPH W. FAIRFIELD
ETHELYN F. BLACK
MAX H. GEWIRTZ
6399 Wilshire Boulevard
Los Angeles 48, California
Attorneys for Appellant

FILED

JUN 7 1957

TABLE OF CASES AND AUTHORITIES CITED

Cases

	Page
Barnett v. Terminal Railroad Assn. of St. Louis, 228 Fed. 2d 756, 761.....	5
Bowles v. Marx Hide and Tallow Co., 153 Fed. 2d 146, 147.....	2
Burdon v. Wood, 142 Fed. 2d 303, 306; Cert. Den., 323 U.S. 733, 65 Sup. Ct. 70; 89 L. Ed. 588.....	2
Burley, Estate of, 146 A.C.A. 695.....	4
Controller of California v. Lockwood, 193 Fed. 2d 169	5
Erickson, In re, 13 Fed. Sup. 853, 855.....	3, 5
Heise v. Earnshaw Publications, 130 Fed. Supp. 38, 41	4
Hutchinson v. Contractors State etc. Board, 143 Cal. App. 2d 628; 300 P. 2d 216.....	5
Wiget v. Becker, 84 Fed. 2d 706.....	3
Wright v. Gordon's Transport, 162 Fed. 2d 590, 591	2

Rule

Rules on Appeal, Rule 23.....	9
-------------------------------	---

In the
United States Court of Appeals
For the Ninth Circuit

MAURICE PENN,

Appellant,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of
L. R. MAHAN, also known as LEMUEL ROSS
MAHAN,

Appellee.

No. 15176

Petition for Rehearing

To the Honorable, Albert Lee Stephens, Stanley Barnes, Circuit Judges, and Charles E. Clark, District Judge:

The appellant above-named respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled cause, and in support of this petition represent to the Court as follows:

We reserve our argued position as to each of the points of appeal, but in this petition address ourselves solely to that feature of the decision wherein we believe the Court may be convinced its result is based upon the application of incorrect legal principles.

Therefore this petition is devoted to convincing this Court that it has erred in its determination on 2 major questions put to it upon appeal.

I.

On page 2 of its printed Opinion, this Court concluded that the finding of insolvency on the date of issue by the Referee was fully justified since the Referee stated that serious questions existed as to whether the finance company is subject to the usury act, or is a personal loan company excluded therefrom, and also *whether the amount claimed is the correct amount*, (italics added). This Court also concluded that the weight to be given to this claim for usury (based on the testimony of Mrs. Mahan, wife of the bankrupt) was properly within the discretion of the Referee.

What this Court overlooked is that Mrs. Mahan was called as a witness by the trustee, and she was a witness for and on behalf of the trustee. Under those circumstances the trustee was bound by her testimony.

It is axiomatic that a party is bound by the testimony of his own witnesses (*Wright v. Gordon's Transport*, 162 Fed. 2d 590, 591). Put another way, it has been held that a litigant cannot challenge his own unimpeached witness (*Burdon v. Wood*, 142 Fed. 2d 303, 306; Certiorari denied, 323 U.S. 733, 65 Sup. Ct. 70; 89 L. Ed. 588). This rule applies even where the litigant is a *quasi* public official. For example, in *Bowles v. Marx Hide and Tallow Co.*, 153 Fed. 2d 146, 147, the

Court held that an OPA Administrator vouches for the credibility of his own witness.

In *Re Erickson*, 13 Fed. Supp. 853, 855, the Court held that where

“An objecting creditor presented the bankrupt as his witness, as his sole witness, and as a credible witness, and is bound by his testimony, and he cannot be impeached or assailed by the objecting creditor.”

In *Wiget v. Becker*, 84 Fed. 2d 706, in reversing a judgment for the defendant, the Court held on page 710 as follows:

“Ordinarily, a party is bound by the testimony of his own witnesses. *Yellow Cab v. Rodgers*, (C. C.A. 3) 61 Fed. (2d) 729. To be sure, the evidence might justify the argument that a witness was mistaken, and the trier of fact may so find, but there must be evidence of mistake. *Michigan Central R. Co. v. Zimmerman*, (C.C.A. 6) 24 Fed. (2d) 23. There is no contention that Mr. Kurtzeborn made any mistake in his testimony, or that the facts upon which counsel have apparently acted in making the statement and admission of record are not true.”

Likewise in the case at bar, no question has been raised why the testimony of Mrs. Mahan as to the value of her claim should be disregarded. Since this is testimony offered by the trustee in behalf of its own case, there is no justification whatsoever, why this testimony should be disregarded.

II.

If we assume, for the sake of argument, that the Referee was justified in giving no weight to the evidence of Mrs. Mahan, then it was still error to find the bankrupt insolvent on the date in issue (Op. p. 2) *for in such event there is no testimony of any type as to the value of the chose in action*. Bearing in mind that the trustee has the burden of proving the value of a chose in action for the purpose of sustaining his obligation that the bankrupt was insolvent, disregarding the testimony of Mrs. Mahan that the chose in action was valued at the sum of \$81,719.61 *does not* establish that the value of the chose in action was that amount or any amount or entirely valueless, for mere disbelief of a witness does not establish an affirmative case (*Heise v. Earnshaw Publications*, 130 Fed. Supp. 38, 41).

In *Estate of Burlew*, 146 A.C.A. 695, the court said on pages 701, 702 as follows:

“While her testimony could have been disbelieved, there was no other evidence to believe, and as is said in *Hutchinson v. Contractors’ State etc. Board*, 143 Cal. App. 2d _____, _____, _____ [300 P. 2d 216]: (Advance Report Citation: 143 A.C.A. 733, 737-738)

‘But the rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. “ ‘Disbelief does not create affirmative evidence to the contrary of that which is discarded. “ ‘The fact that a jury may disbelieve the testi-

mony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (citing cases).” ” . . . The fact that one testifies falsely may, and usually does, afford an inference that he or she is concealing the truth but it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.” ” (citing cases).”

See also *Hutchinson v. Contractors State etc. Board*, 143 Cal. App. 2d 628; 300 P. 2d 216.

In *Barnett v. Terminal Railroad Assn. of St. Louis*, 228 Fed. 2d 756, 761, the court held that:

“Where a party’s own testimony, if true, would defeat his right to a verdict, and such statements are not modified or explained, a verdict may be directed against him.”

In re Erickson, 13 Fed. Supp. 853, 855, the Court held:

“Even so, there is no testimony in the case except that of the bankrupt and it is upon his testimony that reliance must be placed for decision here. The objecting creditor conducted the examination upon the apparent assumption that he was entitled to cross-examine and, if possible, impeach his own witness. A considerable part of the examination was conducted along this line and was not objected to, although objections, if made, would

probably have been sustained by the referee. Examining the record in the light of the foregoing authorities, the report of the referee upon the facts and his recommendations cannot be sustained."

In *Controller of California v. Lockwood*, 193 Fed. 2d 169, this court in commenting upon the duties of a referee in bankruptcy to make findings upon evidence and not suspicion said as follows on page 172:

"We agree with the District Court that there is no factual basis for the referee's conclusion. Suspicion, no matter how aroused, is not evidence. What we find here does not establish the fact in dispute. It lacks the quality of proof. The inference which the referee drew does not rest upon supporting fact or facts. His deduction does not come within the orbit of another certain truth. There are too many loopholes for a false deduction."

The point that appellant has raised and which appellant insists is error, is that even if the referee chose to disregard the testimony of the witness Mrs. Mahan as to the value of the chose in action, then there is no evidence in the record whatsoever as to any value which may be attributed to the chose in action. The referee did state

"That serious questions existed as to whether the finance company is subject to the usury act or is a personal loan company excluded therefrom,

and also whether the amount claimed is the correct amount.” (Italics added) (Op. p. 2)

But although the Referee may have decided to disregard the testimony of Mrs. Mahan and that the claim for usury in the sum of \$81,719.61 was inchoate and uncertain in character and amount, it is also equally true that there is no evidence as to what the actual value of the chose in action is, and the Referee under the circumstances had no basis in fact or otherwise to come to the conclusion that it was entirely valueless.

For the foregoing reasons it is respectfully requested that this petition for a rehearing should be granted.

Respectfully submitted,

JOSEPH W. FAIRFIELD

ETHELYN F. BLACK

MAX H. GEWIRTZ

Attorneys for Appellant

STATE OF CALIFORNIA,
County of Los Angeles.—ss.

JOSEPH W. FAIRFIELD, being first duly sworn,
on oath, certifies and says:

That he is one of the attorneys for appellant in this cause; that he makes this Certificate in compliance with Rule 23 of the Rules of this Court; that in his judgment the within and foregoing Petition for Rehearing is well founded and is not interposed for delay.

JOSEPH W. FAIRFIELD

.....
[Joseph W. Fairfield]

Subscribed and sworn to before me at Los Angeles,
California, this.....6.....day of June, 1957.

ETHELYN F. BLACK

.....
[Ethelyn F. Black]

Notary Public in and for the
State of California, County
of Los Angeles.

No. 15,181

In the

United States Court of Appeals

For the Ninth Circuit

JOHN P. DALEY, MINERVA B. DALEY, MORRIS DALEY, ZELMA B. DALEY, WILLIAM RADTKE, CLARA RADTKE and HOMER BOSSE, Trustee of the Estates of Morris K. Daley, Alice M. Daley, Susan R. Daley, James D. Daley, Kathryn F. Daley and Peter D. Daley,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Opening Brief

ERIC SUTCLIFFE
WILLIAM D. McKEE
ORRICK, DAHLQUIST, HERRINGTON
& SUTCLIFFE

405 Montgomery Street
San Francisco 4, California

Attorneys for Appellants

FILED

NOV 30 1956

PAUL P. O'BRIEN, CLERK

SUBJECT INDEX

	Page
Jurisdiction	1
Statement of the Case.....	2
Specification of Errors.....	5
Argument	6
1. Daley Brothers Delta Venture did not elect the accrual method of accounting for 1942. They either elected the completed contract method or no acceptable method at all. For this reason they are entitled to correct the admitted error in the 1942 return by reporting all receipts and disbursements in 1943, when the contract was completed	6
2. Even if the method of accounting employed in connection with the Delta contract was the accrual method, the District Court should have allowed the refund based on the completed contract method because :	
a) The completed contract method is the only method which clearly reflects the income from the Delta contract ; and	
b) Any election to report on the accrual basis was an innocent mistake of which the taxpayer should be relieved	21
a) The accrual method would not clearly reflect income in this case.....	21
b) Any "election" by the taxpayer to adopt the accrual method of accounting was an innocent mistake, made under an erroneous assumption, and the taxpayer should be relieved of that "election".....	28
3. The grounds stated in the refund claims and the basis asserted in the complaint for refund, included the specification of improper accrual of gross receipts in the amount of \$472,722.15. Thus, the Court should have permitted the correction of the error by correctly applying the accrual method	30
Conclusion	38
Appendix	

TABLE OF AUTHORITIES CITED

CASES	Pages
Agarano v. U. S. (D.C. Hawaii, 1953), 110 F. Supp. 609.....	36
Aluminum Castings Co. v. Routzahn (1930), 282 U.S. 92, 51 S. Ct. 11.....	14, 18
Angelus Milling Co. v. Comm'r. (1945), 325 U.S. 293, 65 S. Ct. 1162	37
Alfred H. Badgley v. Comm'r. (1931), 21 BTA 1055.....	9, 17
Baneroft v. U. S. (Ct. Cls., 1943), 49 F. Supp. 476.....	18
R. G. Bent Co. v. Comm'r. (1932), 26 BTA 1369.....	26
Bent v. Comm'r. (9th Cir., 1932), 56 F.2d 99.....	8, 17, 26, 27
E. E. Black Ltd. v. Alsup (9th Cir., 1954), 211 F.2d 879.....	17, 18
Caldwell v. Comm'r. (2d Cir., 1953), 202 F.2d 112.....	27
Chatham & Phenix National Bank (1925), 1 BTA 460.....	19
Continental Bank and Trust Co. v. U. S. (1932), 19 F. Supp. 15	20, 23
Estate of Cyrus H. K. Curtis (1937), 36 BTA 899.....	29
Dally v. Comm'r. (1953), 20 T.C. 894, aff'd (9th Cir., 1955), 227 F.2d 724, cert. den. 315 U.S. 908.....	3, 12, 23, 37
Ehret-Day v. Comm'r. (1943), 2 T.C. 25.....	17
Evergreen Cemetery Association v. Comm'r. (1932), 25 BTA 544 (1932)	19
Fort Pitt Bridge Works v. Comm'r., 24 BTA 626, aff'd 92 F.2d 825 (3d Cir., 1937).....	8, 9, 17, 36
Foster Box Board Co. v. Clarke, 7 F. Supp. 682, aff'd (2d Cir., 1937), 90 F.2d 1008.....	38
Russell G. Finn, et al. v. Comm'r. (1931), 22 BTA 799.....	18
B. F. Goodrich Co. v. Comm'r., 1 T.C. 1098 (1943).....	19
Herberger v. Comm'r. (9th Cir., 1952), 195 F.2d 293.....	27
Ives Dairy, Inc. (1931), 23 BTA 579, aff'd (5th Cir., 1933), 85 F.2d 135	25
Key Largo Shores Properties, Inc. v. Comm'r., 21 BTA 1008 (1930)	24
George N. Klemeyer (1930), 20 BTA 934.....	29

TABLE OF AUTHORITIES CITED

iii

	Pages
Howbert v. Penrose (10th Cir., 1930), 38 F.2d 577.....	38
L. O. Layton v. Comm'r. (1952), 11 T.C.M. 1115.....	12, 24
Lebolt & Co. v. U. S. (1929), 67 Court of Claims 422.....	21, 33
Lehigh & Wilkes-Barre Coal Co. v. U. S. (D.C. Penn., 1930), 38 F.2d 637	38
McIntosh v. Wilkinson (E.D. Wise. 1929), 36 F.2d 807.....	30
Meyer Est. et al. v. Comm'r. (5th Cir., 1952), 200 F.2d 592.....	28
Morrow, Becker & Ewing, Inc. v. Comm'r. (5th Cir. 1932), 57 F.2d 1	30
National Contracting Co. v. Comm'r. (1938), 37 BTA 689 at 702	24
Northwestern Nat. Bk. & Tr. Co. of Minn. v. U. S. (D.C. Minn., 1942), 46 F.Supp. 390, aff'd 137 F.2d 761.....	38
Ohio Brass Co. v. Comm'r. (1929), 17 BTA 1199.....	19
Old Colony Ry. Co. v. Comm'r., 284 U.S. 552, 52 S. Ct. 211 (1932)	19
Pacific National Co. v. Weleh (1937), 304 U.S. 191, 58 S. Ct. 857 at 858.....	25
Pfeiffer v. Jones (D.C. 1954), 57 Supp. 621.....	18
Reynolds Cattle Co. (1934), 31 BTA 206.....	25
Samara v. United States (2d Cir.), 129 F.2d 594.....	32
Spring City Foundry Company v. Comm'r. (1934), 292 U.S. 182, 183, 54 S. Ct. 644.....	8
Standard Computing Scale Co. v. U. S. (Ct. Cl., 1931), 52 F.2d 1018	33
Tidewater Oil Co. v. Comm'r., 29 BTA 1208.....	22, 28
Walter Tillman Estate (1928), 10 BTA 4.....	26
Troy Mfg. Co., 7 BTA 119 (1927).....	19
Union Trust Co. of Pittsburgh et al. v. McCaughn (D.C. Penn., 1927), 24 F.2d 459.....	37, 38
United Profit-Sharing Corporation v. United States, 66 Court of Claims 171.....	20

	Pages
Uptegrove Lumber Co. v. Comm'r. (3d Cir., 1953), 204 F.2d 570	35
U. S. v. Harmon (10th Cir., 1953), 205 F.2d 919.....	12, 23, 37
Weiss v. Weiner, 279 U.S. 333, 49 S. Ct. 337 (1929).....	19
Wetherbee Electric Co. v. Jones (W.D. Okla. 1947), 73 F. Supp. 765, appeal dismissed (10th Cir., 1947).....	20

STATUTES

1939 Internal Revenue Code

Sec. 41	6, 7
Sec. 42	26

Sixth Supplemental National Defense Appropriations Act, 1942, Pub. L. No. 528, 77th Cong. 2d Sess., April 28, 1942 as amended by Pub. L. No. 753, 77th Cong., 2d Sess., October 21, 1942.....	15, Appendix 1
---	----------------

REGULATIONS

Treasury Regulations 103 (Title 26, Code of Federal Regulations)

Sec. 19.22(a)-5	35
Sec. 19.41-2	7, 19, 26, 27
Sec. 19.41-3	19

Renegotiation Regulations of the War Contracts Price Adjustment Board (Title 32, Code of Federal Regulations, Parts 1601-1608 (Supplement 1944)).....	15, 16, Appendix 3-6
---	----------------------

MISCELLANEOUS

Introduction to Renegotiation Regulations (Commerce Clearing House War Law Service, Government Contracts, page 2905)	15, Appendix 2
I.T. 1450, 1-2 Cumulative Bulletin 200.....	33
Federal Rules of Civil Procedure, Rule 54(c).....	36

No. 15181

In the

United States Court of Appeals

For the Ninth Circuit

JOHN P. DALEY, MINERVA B. DALEY, MORRIS DALEY, ZELMA B. DALEY, WILLIAM RADTKE, CLARA RADTKE and HOMER BOSSE, Trustee of the Estates of Morris K. Daley, Alice M. Daley, Susan R. Daley, James D. Daley, Kathryn F. Daley and Peter D. Daley,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Opening Brief

JURISDICTION

This is an appeal from a judgment of the United States District Court for the Northern District of California, Southern Division, against the plaintiffs, taxpayers, and in favor of the defendant, United States of America.

The action brought in the District Court was for recovery of income taxes in excess of \$10,000 alleged to have been erroneously and illegally assessed and collected under the 1939 Internal Revenue Code by a Collector of Internal

Revenue not in office at the time the action was commenced. Complaint, paragraph I (Tr. 3). The jurisdiction of the District Court was based upon Title 28, United States Code, Section 1346(a)(1)(ii).

The judgment of the District Court, filed and entered on March 23, 1956 (Tr. 112) was a final decision of the District Court, and the appellate jurisdiction of this court is found in Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

Plaintiffs John and Morris Daley had been engaged in the construction business since 1935, doing business in partnership as "Daley Brothers." They had consistently followed the completed contract method of accounting in connection with that business, under which profit or loss on construction contracts is determined and reported for tax purposes only when the contract is completed.

On June 30, 1942, John and Morris Daley formed a new partnership, Daley Bros., Ltd., to continue the construction business theretofore conducted by them. This partnership consisted of themselves as general partners and plaintiff Homer Bosse as trustee for their children as limited partner. On July 8, 1942, a War Department contract was obtained in the name "Daley Brothers" (but for the benefit of Daley Bros., Ltd.) for the construction of the Abraham Relocation Center at Delta, Utah. Daley Bros., Ltd. and plaintiff William Radtke formed a joint venture to perform this contract. The contract was originally scheduled for completion on September 6, 1942, but the time for completion was extended several times and the contract was finally completed and accepted by the United States on February 16, 1943.

In January, 1943, when the Delta contract was 99% complete, an army officer assigned to renegotiate the Delta con-

tract required that the books be closed on that contract as of December 31, 1942, so that the contract could be renegotiated for 1942 and he could "get off to war". John Daley, who was the managing partner, protested closing the books on the Delta contract before it was fully completed, but finally agreed to do so. At the time the Delta contract was obtained, the full contract price was entered in the books of account as an account receivable without regard to the time at which the right to such price would accrue. Upon closing such books on December 31, 1942, there was deducted from such full contract price costs which had been incurred to December 31, 1942 in performing such contract, plus some additional costs which the accountant estimated would be incurred to complete the contract. Thus the books of account after closing as of December 31, 1942 showed the profit estimated to be realized upon completion of the Delta contract, and the contract was renegotiated on that basis.

The joint venture filed a separate partnership income tax return in the name "Daley Brothers Delta Venture" for 1942 with respect to the Delta contract, and reported income from the Delta contract in accordance with the books of account. In so doing, they reported the *full contract price* of the Delta contract as gross receipts for 1942, even though the joint venture had not received, and was not then entitled to receive, \$472,722.15 of that price. This sum represented "holdbacks" which the United States was entitled to retain until final acceptance of the contract, and the price of certain items of the contract which had not then been approved for payment by the contracting officer. Such items are income only when the conditions relating thereto have been removed. See, e.g., *Chas. F. Dally v. Comm'r.* (1953). 20 T.C. 894, *aff'd* (9th Cir. 1955) 227 F.2d 724, *cert. den.*, 315

U.S. 908. No partnership return was filed by Daley Brothers Delta Venture for 1943, because all the income from the Delta contract had been reported in 1942.

When the plaintiffs discovered the error which had been made in the 1942 Daley Brothers Delta Venture return, they filed timely claims for refund, based on amended returns. The amended return for 1942 corrected the original return by eliminating from gross receipts the \$472,722.15 which was improperly accrued, and by showing the balance of the contract price as gross receipts which had been paid as "advances." The amended 1943 return reported the full amount of the income from the Delta contract in that year when the contract was completed. The changes in tax liability thus computed resulted in net overpayments of taxes for the two years 1942 and 1943 taken together, and refunds for such overpayments were requested. The claims for refund were denied and the plaintiffs brought the action in the District Court below.

In the District Court the plaintiffs presented evidence which proved, to the satisfaction of the District Court, that the 1942 return was erroneous in reporting the full contract price of the Delta contract in that year because the joint venture had not received and was not entitled to receive \$472,722.15 of that price until after the close of the year.

The plaintiffs also presented evidence to prove that none of the gross receipts reported in 1942 should have been reported as income for that year because they had adopted the "completed contract" method of reporting the income from the Delta contract. The plaintiffs also argued in the District Court that whether or not the joint venture had adopted the completed contract method of accounting, it was entitled to eliminate all receipts and deductions in 1942, and report such items in 1943, because the joint venture was

required and entitled to use the method of accounting consistently used by Daley Brothers since 1935 and because no other method would clearly reflect the income from the Delta contract.

It was the position of the defendant in the District Court that the partnership had adopted the accrual method of accounting and that the 1942 return correctly reported all income which had accrued in 1942.

The District Court found that the joint venture had been entitled to elect and had elected to report its income from the Delta contract on the accrual method of accounting. The court also found that the 1942 partnership return was erroneous in reporting the full contract price as gross receipts, because a portion of that price had not accrued until 1943. Despite the error which the District Court found the plaintiffs had made in the 1942 return, the court gave judgment for the defendant. It held that the plaintiffs could not shift the Delta contract receipts to 1943 to the extent of the erroneous accrual in 1942, because the refund claims and the complaint sought refunds solely on the grounds that *all* of the receipts had been erroneously included in 1942.

The questions on appeal are whether the District Court was correct in determining that the plaintiffs had elected the accrual method of accounting in the original 1942 return, and whether in any event they are entitled to correct the admitted error which was made in the 1942 return, regardless of the nature of that error.

SPECIFICATION OF ERRORS

It is submitted that the District Court erred in three respects. Such errors are all found in paragraph III of the District Court's Conclusions of Law (Tr. 111). The errors are as follows:

1. The District Court erred in finding that Daley Brothers Delta Venture elected to report the income from the Delta contract for the year 1942 on the accrual basis of accounting.

2. Assuming that the District Court correctly concluded, as a matter of law, that Daley Brothers Delta Venture elected to report its income from the Delta contract on the accrual basis of accounting, the District Court erred in failing to allow the plaintiffs to correct the admitted error in the return filed for 1942 by reporting all of the income and deductions applicable to such contract in 1943, when the contract was completed.

3. The District Court erred in finding that the grounds stated in the refund claims and complaint for refund were *solely* that all of the receipts from the Delta contract had been erroneously reported as income in 1942.

ARGUMENT

1. **Daley Brothers Delta Venture did not elect the accrual method of accounting for 1942. They either elected the completed contract method or no acceptable method at all. For this reason they are entitled to correct the admitted error in the 1942 return by reporting all receipts and disbursements in 1943, when the contract was completed.**

The Internal Revenue Code¹ establishes the general rule for income tax accounting as follows:

"Sec. 41. General Rule.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keep-

1. Citations to the Internal Revenue Code are to the 1939 Code as in effect in 1942 and 1943. Citations to regulations are to Treasury Regulations 103 (Title 26, Code of Federal Regulations) as in effect in 1942 and 1943.

ing the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income * * *."

Section 41 thus establishes as a rule of statutory law, that if the taxpayer employs a method of accounting which clearly reflects income, he must compute his income for tax purposes on the basis of that method. The Regulations reiterate this rule in the following language:

"The true income, computed under the Internal Revenue Code and, if the taxpayer keeps books of account, in accordance with the method of accounting regularly employed in keeping such books (provided the method so used is properly applicable in determining the net income of the taxpayer for purposes of taxation), shall in all cases be entered in the return." Regs. Sec. 19.41-2 (second paragraph).

Because the statute itself refers to the taxpayer's books of account, evidence as to the manner in which those books are kept is all important in a case of this sort. It is submitted that the District Court disregarded the direct evidence as to the ultimate accounting facts in this case, and relied instead upon evidence having no real significance in the determination of what method of accounting had been employed in keeping the books with respect to the Delta contract.

In order to understand the significance of the accounting evidence in this case it may be helpful to review the nature of the cash, accrual, and completed contract methods of accounting.

As a general proposition there are two basic methods of accounting used by taxpayers, and generally accepted as

clearly reflecting income. One is the cash method and the other is the accrual method. Under the cash method, income is reported when received and expenses are recorded when paid. Under the accrual method, income is recorded when accrued and expenses are recorded when incurred. The Supreme Court described the difference between the cash and accrual method of accounting in *Spring City Foundry Company v. Comm'r.* (1934), 292 U.S. 182, 183, 54 S.Ct. 644, as follows:

“Keeping accounts and making returns on the accrual basis, as distinguished from the cash basis, import that it is the *right* to receive and not the actual receipt that determines the inclusion of the amount in gross income. When the right to receive an amount becomes fixed, the right accrues.”

While the cash and accrual accounting methods are basic, the accounting profession, the Treasury Department's regulations, and the cases have recognized that there may be refinements and variations of these basic methods and that these basic methods may be utilized together with other accounting concepts, to make the computation of net income more convenient or the results of such computation more informative. If such variations are consistently applied by the taxpayer and clearly reflect the income, they are also acceptable for income tax purposes. One such refinement which has been held acceptable is the completed contract method of accounting. See *Bent v. Comm'r.*, 56 F.2d 99 (9th Cir., 1932). The relation between the accrual method of accounting and the completed contract method is not at all complex, and has been clearly and concisely stated by the Board of Tax Appeals in *Fort Pitt Bridge Works v. Comm'r.*, 24 BTA 626, at 641, aff'd 92 F.2d 825 (3rd Cir., 1937), as follows:

“The accounting system employed by the petitioner is the completed-contract system. It is a modification of a strict accrual method and differs in the one respect that items of income and expense, though recorded in primary accounts when accrued or incurred, are not carried into profit and loss as earnings of the business until the contract to which they relate is completed. A separate account is kept for each contract. Any debit balance in the account represents the investment in the contract and any credit balance represents the unearned income until the completion of the contract. A characteristic of this system is that income earned in one accounting period may not be accounted for until a later period. It is peculiarly adapted to a business fulfilling contracts which lap over accounting periods where the ultimate gain or loss can not be accurately determined until the completion of the contract. It may be used even though the contracts call for payment on the basis of a certain price per pound. The contracts need not run for more than a year. The Commissioner’s regulations permit its use. It has been approved, for tax purposes, by the courts and by this Board.”

It is undoubtedly true, as stated in the *Fort Pitt Bridge* case, that the accrual basis of keeping the primary accounts is generally employed in conjunction with the completed contract method. However, the accrual method of keeping accounts is by no means necessary to the completed contract method of recording profit. Thus, in *Alfred H. Badgley v. Comm’r.* (1931), 21 BTA 1055 at 1058, the court said:

“It is entirely clear from the books, however, that the petitioner’s accounting practice was formulated with the objective of postponing an accounting of the gain or loss on each project until the project has been completed. We have not found in the ‘income account’ or the profit and loss account a single entry intended to

record a gain or loss on any project prior to completion. Considering the objective of the petitioner's accounting practice, the method of keeping the primary accounts was not important. They could be kept on either a cash receipts and disbursements basis, or on an accrual basis, or on a hybrid basis, without creating any impediment in attaining the objective, since the entries in those accounts were used to ascertain gains and losses on the projects to which they related only when the projects had been completed. It did not matter whether costs were recorded in the primary accounts when paid or when incurred, or income recorded when received or when due, provided that there was a complete and accurate accounting for all costs and income pertaining to each project at some time before the project accounts were closed into 'income account.' The method of accounting is not determinable alone from the practice followed in recording financial items in the primary accounts, but is reflected rather by the system in which these primary entries were carried forward to ascertain periodical gains and losses."

Obviously, if profits are to be determined only when a job is completed, the principal function of the primary accounts will be fulfilled if income earned and costs incurred at the time of completion have been recorded at that time. With a fixed-price contract such as the Delta contract, for example, the total amount of the receipts ultimately to be realized is known when the contract is entered into. It is only the costs which will not be known until completion. Since the income will not be written into profit and loss until the job is done and all costs have been incurred, no distortion will result from entering the full contract price on the books at the time the contract is signed. Since no interim determination of profit and loss is contemplated, no advantage is to be derived from making separate entries as the right accrues, from time to time, to receive portions of the total payment.

The accounting evidence in this case revealed that this was what was done in connection with the Delta contract. No entries were made when a right to receive a specific payment accrued. Instead, on August 1, 1942, shortly after the contract was obtained, *the original contract price was entered as an account receivable*, and was distributed through credit items to overhead, job costs, and estimated profit (Tr. 223-224). Similar procedures were adopted upon receiving information concerning change orders increasing the total contract price (Tr. 225). This had the effect of bringing into gross income the full amount of the contract price before any work on the contract had commenced. When the books of account were closed out to profit and loss as of December 31, 1942, no adjustment was made to the income items to reflect that the plaintiffs were not yet entitled to receive a very substantial portion of the contract price. The debit balance in the job cost account (representing the difference between the portion of the full contract price credited to job costs and job costs incurred to December 31, 1942), was transferred to profit and loss and similar entries were made with respect to the other accounts to which the balance of the original contract price had been credited (Tr. 233).

This evidence demonstrates at once why the accounting method employed by the joint venture was not the accrual method, and why the 1942 return overstated gross receipts in the amount of \$472,722.15. If the accounting method adopted had been the accrual method, either the contract price would have been entered only as the joint venture became entitled to receive portions thereof from time to time, or else some adjustment would have been made as of December 31 to eliminate the \$472,722.15 which had not accrued as of that date. This amount consisted of \$299,-

430.73 not yet approved for payment by the contracting officer under Article 16(a) of the Delta contract (Tr. 45), and \$173,291.42 retained by the United States as a "hold-back" under Article 16(b) of the Delta contract (Tr. 45). See Exhibit 15 to Stipulation of Facts (Tr. 79) from which these amounts are determined. See also *Dally v. Comm'r.* (1953), 20 T.C. 894, aff'd (9th Cir., 1955), 227 F.2d 724, cert. den., 315 U.S. 908; *U. S. v. Harmon* (10th Cir., 1953), 205 F.2d 919; and *L. O. Layton v. Comm'r.* (1952), 11 T.C.M. 1115, holding that such amounts do not constitute proper accruals until the contractor becomes entitled to receive them.

This evidence also demonstrates that the accounting method employed was the completed contract method. Taking the full contract price into income at the time the contract is entered into is a sensible procedure *only* if the taxpayer waits until the contract is fully completed before closing out the books. In addition, however, the testimony of the accountant was that he made an effort to bring into the computation of income in 1942 other costs which he considered were applicable to the contract even though not technically incurred (Tr. 220-221, 239). This makes sense only if an attempt is being made to determine the whole profit from the contract, which is the essence of the completed contract method.

Other evidence that the completed contract method of accounting was employed included:

a) The testimony of the accountant who closed the books and prepared the return that the completed contract method was used (Tr. 217, 239).

b) The stipulation of fact that the completed contract method had consistently been employed by Daley Brothers for many years prior to 1942 (Tr. 18), and

the testimony that jobs commenced in 1941 were closed out on the completed contract basis in 1942 (Tr. 175-178) and that no new books of account were established for the various joint ventures with William Radtke (Tr. 152, 218).

c) The testimony of John P. Daley that no return was filed in the name Daley Brothers Delta Venture for 1943 because the 1942 return showed the Delta contract as completed (Tr. 147-148).

It is quite clear from a reading of the opinion and findings of fact of the District Court, that its determination that the joint venture "elected" the accrual method of accounting is based upon three facts, none of which is disputed. These facts are as follows:

1. On the partnership return for Daley Brothers Delta Venture, the statement appears that it was prepared on the accrual basis (Findings of Fact V, Tr. 109).

2. In connection with renegotiation proceedings on the Delta contract, John P. Daley reported that the accrual basis was used for income tax purposes (*Ibid.*).

3. All parties knew that the contract was not completed on December 31, 1942 (Findings of Fact VII, Tr. 110).

It is submitted that the first point is wholly immaterial. The statement in the original tax return is in the Transcript at page 87. It appears under the heading "QUESTIONS" and reads as follows:

"4. Check whether this return was prepared on the cash [] or accrual [x] basis."

No space appears in the return for the completed contract method. The primary accounts were obviously not kept on

the cash basis and were more nearly accrual than anything else. Perhaps of even greater significance is that question No. 4 on the amended return for 1943, which was admittedly prepared on the completed contract method, was answered in precisely the same manner. See Tr. 92. In any event, with respect to an almost identical question the Supreme Court said the following (*Aluminum Castings Co. v. Routzahn* (1930), 282 U.S. 92, 51 S.Ct. 11 at p. 14) :

“Petitioner, relying on the declarations in its returns that they were made on the basis of actual receipts and disbursements, contends that for that reason they must be deemed made under section 12(a) and not under section 13(d). But whether a return is made on the accrual basis, or on that of actual receipts and disbursements, is not determined by the label which the taxpayer chooses to place upon it.”

The second point upon which the District Court relied in finding that the joint venture elected to report income on the accrual basis of accounting is based upon a statement appearing on a form submitted by Daley Brothers to a renegotiation officer on January 26, 1943. On this form John Daley replied that revenue was reported on the accrual basis, rather than the completed contract or cash receipts basis, for income tax purposes (See Exhibit 16 to Stipulation of Facts, Tr. 82).

Mr. Daley's testimony in connection with this statement appears on pages 185-189 of the Transcript, and may be summarized as follows :

In January, 1943, the officer assigned to renegotiate the Delta contract and other contracts undertaken by Daley Brothers in 1942 was anxious to “get off and go to war”. He demanded that the books be closed on the Delta contract as of December 31, 1942. John Daley believed that the information submitted for income tax

purposes had to comply with the information submitted for renegotiation purposes. Since he knew that the contract was not completed on December 31, 1942, he thought it would be necessary to report income for tax purposes on some basis other than the completed contract method. However, he did not know either then or at the time of the trial what the "accrual" basis of accounting is, and marked that space on the form only to avoid marking "completed contract."

This testimony takes on added significance in light of the renegotiation laws and procedures then in effect.² Under renegotiation procedures contracts were renegotiated on a fiscal year basis.³ Moreover, if a contractor used the completed contract method of accounting for income tax purposes, the same method of accounting was required for renegotiation purposes, and such contracts would be renegotiated only after the end of the fiscal year in which they were reported as having been completed.⁴ It seems clear, therefore, that unless a tax return reporting income from the Delta contract was filed for 1942, either on the completed contract basis or on some other basis, the renegotiation officer would have had to wait for a full year to renegotiate the Delta contract.

It is submitted that this evidence does not support the conclusion of the District Court that the accrual method of accounting was used in connection with the Delta contract. Mr. Daley's statement, in view of his limited knowledge of

2. Statutes, regulations and other material appear in the Appendix.

3. Section 403(c)(5), Sixth Supplemental National Defense Appropriations Act, 1942, as amended; Renegotiation Regulations § 301.2. (Appendix pg. 1, 3.) See also "Renegotiation Procedures". (Appendix pg. 2.)

4. Renegotiation Regulations §§ 301.3, 301.6. (Appendix pg. 4, 6.)

accounting methods, meant only that results of the Delta contract would be reported for tax purposes before it was completed.

Moreover, the renegotiation officer did not require that the taxpayers shift to an accrual method of accounting. On the contrary, if adjustment had been made to report only Delta contract receipts which had accrued,⁵ \$472,722.15 of the contract price would have been excluded, and a loss would have resulted. This clearly would have been unacceptable to the renegotiation officer. On the other hand, if the completed contract method were applied, and the contract were considered to be complete on December 31, 1942, the renegotiation officer would get substantially the figures and result he was looking for. It is submitted that this is the sum and substance of what was done.

The third point upon which the District Court relied to find that the accrual basis of accounting was "elected", and the only point mentioned in the opinion, was that all parties knew that the contract was not completed on December 31, 1942. Findings of Fact VII, Tr. 110. Opinion, Tr. 105, 106. This, of course, does not bear upon the question of whether the accrual basis of accounting was used. It does not even prove that the completed contract method of accounting was *not* used. The District Court said in its opinion that the "fundamental feature" of the completed contract method is the practice of treating receipts as income "as of a particular time; namely, the completion date of the contract" (Tr. 105). The court also said that there was no merit to the contention that the intention was to report the receipts from the Delta contract by the completed contract method in the 1942 return "inasmuch as the fundamental aspect of the

5. As would have been required under Renegotiation Regulations § 301.2(2). (Appendix pg. 3.)

completed contract method of accounting is to report contract receipts as income in the year the contract is completed" (Tr. 106). But the District Court overlooked the fact that *it took more than 10 years of litigation* to establish what is now described as the "fundamental feature" of the completed contract method. For it was not until the decision of this court in 1954, in *E. E. Black Ltd. v. Alsup* (9th Cir., 1954), 211 F.2d 879, that it was determined that the income from a contract could not be reported under the completed contract method when the contract was substantially completed, rather than when it was fully completed. This court in that case reversed the District Court which had found that substantial completion was sufficient, and overruled a similar decision of the Tax Court in *Ehret-Day v. Comm'r.* (1943), 2 T.C. 25. The Delta contract was, of course, very nearly completed on December 31, 1942. Exhibit 15 to the Stipulation of Facts (Tr. 79) shows that on December 1, 1942 the contract was estimated to be more than 90% complete. And in the data submitted to the renegotiation officer under date of January 26, 1943 the contract is shown to have been 99% complete (Tr. 81).

Thus, the "fundamental feature" of the completed contract method is not closing out the books as of a given date (though that is one feature). The fundamental feature is reporting all receipts and expenses of the contract in one accounting period, so as to give a true picture of the results of the contract. *Bent v. Comm'r.* (9th Cir., 1932), 56 F.2d 99; *Fort Pitt Bridge Works v. Comm'r.*, 24 BTA 626, aff'd (3rd Cir., 1937) 92 F.2d 825; *Alfred H. Badgley v. Comm'r.* (1931), 21 BTA 1055. The accounting procedures adopted herein contained this fundamental and distinctive feature of the completed contract method of accounting. The error which was made was in closing out the contract before it was completed and all income earned.

It is submitted that under Section 41 of the Internal Revenue Code, the question in this case is what method of accounting was employed by the joint venture. The District Court, in finding that the accrual method of accounting had been "elected" relied only upon the fact that the contract was not completed (which establishes only that the completed contract method was not *correctly* employed), and upon the label placed upon the method by one of the plaintiffs, who did not even know the meaning of the label. As stated by the United States Supreme Court, "whether a return is made on the accrual basis * * *, is not determined by the label which the taxpayer chooses to place upon it." *Aluminum Castings Co. v. Routzahn* (1930), 282 U.S. 92, 51 S. Ct. 11 at p. 14. See also, *Pfeiffer v. Jones* (D.C. 1954), 57 F. Supp. 621; *Bancroft v. U. S.* (Ct. Cls., 1943), 49 F. Supp. 476.

There can be no doubt that if the District Court was in error in holding that the accrual method was employed, it should have permitted refunds based upon the completed contract method. If, as is submitted, the evidence proved that the appellants adopted the completed contract method, then the error which was made was to report the income and disbursements before completion. *E. E. Black, Ltd. v. Alsup* (9th Cir., 1954), 211 F.2d 879. The manner in which the taxpayer is entitled to correct the error in such cases is to eliminate all income and disbursement from the 1942 return and transfer them to 1943. See *Russell G. Finn, et al.* (1931), 22 BTA 799, at 803, where the Board said:

"The partnership having kept its books upon the completed contract basis, the statute requires that its net income shall be computed upon the same basis. On this basis, gains and losses derived from long-term contracts are to be included in income only when the jobs are completed. Since the Northville and Oakland Hills jobs were not completed until 1921, any gains in

respect of those jobs should be eliminated from the income for 1920."

See also *Ohio Brass Co. v. Comm'r.* (1929), 17 BTA 1199, and *Evergreen Cemetery Association v. Comm'r.* (1932), 25 BTA 544.

And if the manner of keeping the accounts in connection with the Delta contract was *not* the completed contract method, it was a method which was unacceptable, since it did not "clearly reflect the income".

The cases are clear that a minimum standard for computing income established by Section 41 of the Internal Revenue Code is that there must be "income" in the tax sense in the taxable year before the taxpayer may be required or permitted to account for that income in that year. *Weiss v. Weiner*, 279 U.S. 333, 335, 49 S. Ct. 337 (1929); *Old Colony Ry. Co. v. Comm'r.*, 284 U.S. 552, 52 S. Ct. 211 (1932); *B. F. Goodrich Co. v. Comm'r.*, 1 T.C. 1098 (1943); *Evergreen Cemetery Association v. Comm'r.*, 25 BTA 544 (1932); *Ohio Brass Co. v. Comm'r.*, 17 BTA 1199 (1929); *Troy Mfg. Co.*, 7 BTA 119 (1927); Regs. Sec. 19.41-2⁶; Regs. Sec. 19.41-3⁷.

And when the method of accounting adopted by the taxpayer has the effect of reporting income not earned, as was the necessary effect of the procedures adopted here, the taxpayer is entitled to adopt a different method which does not have that objectionable feature. For example, in *Chatham & Phenix National Bank* (1925), 1 BTA 460, a Bank for

6. " * * * The *true income*, computed under the Internal Revenue Code and, if the taxpayer keeps books of account, in accordance with the method of accounting regularly employed in keeping such books (provided the method so used is properly applicable in determining the net income of the taxpayer for purposes of taxation), shall in all cases be entered in the return * * *" (Italics added.)

7. " * * * Each taxpayer is required by law to make a return of his true income * * *"

many years included in its income for income tax purposes discounts neither received nor accrued within the year. In 1918, the Bank changed its method of accounting for discounts to the accrual basis. The Commissioner refused to allow the change of accounting method. The Board disapproved the action of the Commissioner, stating:

“The statute contemplates an accounting method which will correctly reflect income, and we do not doubt the reasonableness of the above regulation [requiring the Commissioner’s consent to change an accounting method] when the change is from a method of accounting which reflects income to another approved method, and the Commissioner may be justified in refusing to permit a change without adjustment of prior returns. Here we have a change from a method of accounting which includes items not properly income and we do not think a change to a method which will clearly reflect income can be prevented, and the taxpayer compelled to report amounts not properly taxable as income. Whenever the bar of the statute of limitations does not prevent such action, the prior returns should be adjusted so as to show the correct income. The statute appears to have barred any adjustments herein in prior returns, but the situation is a practical one and we think the taxpayer must be permitted to place its books upon a basis which clearly reflects its income. It has adopted the accrual method for this purpose and we believe that method will accomplish the desired result when properly applied.”

In *Wetherbee Electric Co. v. Jones* (W.D. Okla. 1947), 73 F. Supp. 765, appeal dismissed (10th Cir., 1947), it was held that a taxpayer, without the Commissioner’s consent, could make corrections in its original returns necessary to clearly reflect income. See also *Continental Bank and Trust Co. v. U.S.* (1932), 19 F. Supp. 15; *United Profit-Sharing Corporation v. United States*, 66 Court of Claims 171.

2. Even if the method of accounting employed in connection with the Delta contract was the accrual method, the District Court should have allowed the refund based on the completed contract method because:

- a) The completed contract method is the only method which clearly reflects the income from the Delta contract; and**
- b) Any election to report on the accrual basis was an innocent mistake of which the taxpayer should be relieved.**

a) THE ACCRUAL METHOD WOULD NOT CLEARLY REFLECT INCOME IN THIS CASE.

In holding that the taxpayers had "elected" the accrual basis of reporting income *and that they were bound by that method*, the District Court disregarded a number of cases holding that an election to adopt a generally acceptable method of accounting which does not clearly reflect income in the particular case is no election at all, and the taxpayer is not bound by that "election" and may correct his error by adopting another method of accounting which does clearly reflect the income.

The doctrine of "election" denies the taxpayer the right to a refund of taxes paid only when his original return correctly reported his income. The doctrine has been clearly stated and consistently applied in a number of cases. Thus, in *Lebolt & Co. v. U. S.* (1929), 67 Court of Claims 422, the taxpayer had for five years followed the practice of adding amounts paid for customs duties to the cost of imports. Thereafter, the taxpayer filed claims for refund for each of the years on the ground that the custom duties were currently deductible. When the claims were denied, the taxpayer sued for refund. The court described the doctrine of election as follows:

"The weight of authority is to the effect that where there are two methods of making an income tax return, either one of which is legal and proper, and the taxpayer has made his return in accordance with one of these methods, then, if the return is accepted and taxes

paid accordingly, the taxpayer can not subsequently change to the other method of making a return and thereby become entitled to a refund. But if there is only one legal and proper method of making a return and the taxpayer erroneously makes his return by some other method, then, even though the return has been accepted and the taxes paid, he may file an amended return correcting the error, and if this return shows an overpayment, he becomes entitled to a refund."

It was held that the regulations properly permitted either treatment of customs duties and that the method originally adopted by the plaintiff was in accordance with good accounting practice. Accordingly, the plaintiff's petition was dismissed.

On the other hand, where the original basis for determining the income reported on the return was improper, the taxpayers have consistently been permitted to correct the error by amended return or claim for refund. Thus, in *Tide Water Oil Co. v. Comm'r.*, 29 BTA 1208, the petitioner had claimed to be "affiliated" with a related corporation (Tidal) and had filed its return on that basis. After the statute of limitations had run it was determined that the related corporation was not an affiliate and at that time it was too late for the Commissioner to make an assessment against the related corporation. In order to prevent the escape of the related corporation's income from taxation, the Commissioner argued both that the petitioner was estopped by its earlier representations, and that it was bound by its election to treat the related corporation as an affiliate. The court held that the petitioner was not estopped because all the facts were known to the Commissioner, and answered the arguments as to election in the following language (at page 1222):

“Election and waiver have been suggested as a basis for estopping the petitioner. In order to be bound by his election a party must have had a right to elect and must have made an election with knowledge of his rights upon which the other party properly relied. The necessary right to elect, the election, and reliance are all absent in this case. This petitioner had no right to elect whether it would be taxed by including Tidal in the affiliated group with it, or whether it would be taxed by excluding Tidal from the affiliated group. The taxing statute gave no such election, but provided that only in certain circumstances could there be affiliation. Under that statute the petitioner and Tidal were not affiliated and no inconsistent choice of theirs would have bound either the Commissioner or the taxpayers. Cases in which taxpayers had an election, made their choice and were held to it are not in point.”

Another case in which the taxpayer was allowed to recover a tax erroneously paid because the method of determining income which was first “elected” was improper is *Continental Bank and Trust Co. v. U. S.*, 19 F. Supp. 15 (D.C., 1937). In that case the plaintiff had reported the full sales price from stock rights as income in accordance with an option granted by the regulations. The court held that the regulations were invalid, and since the income which had been reported was not earned, the taxpayer could correct the error and was entitled to recover the tax paid through claim for refund.

It cannot be disputed that in this case the accounting procedures adopted by the joint venture did not clearly reflect the income which had been earned from the Delta contract in 1942. There was a total of \$472,722.15 of gross receipts which was erroneously included in the tax return in the year 1942. *Dally v. Comm’r.* (1953), 20 T.C. 894, aff’d. (9th Cir., 1955), 227 F.2d 724, cert. den., 315 U.S. 908; *U. S. v. Har-*

mon (10th Cir., 1953), 205 F.2d 919; *L. O. Layton v. Comm'r.* (1952), 11 T.C.M. 1115; *National Contracting Co. v. Comm'r.* (1938), 37 BTA 689 at 702.

The District Court conceded this much, but the Court held that the only way in which the error could be corrected was to correctly apply the accrual basis of accounting. The weakness in this argument is that the correct application of the accrual basis of accounting would not "clearly reflect the income." Thus, the net income reported in the original 1942 return (Tr. 86), was \$206,250.44. If the improper accruals were eliminated from gross receipts, there would be a *loss* reported of \$266,471.71! And when the receipts removed from 1942 were added to 1943, there would be net income in 1943 of \$472,722.15. While these figures would be adjusted somewhat by moving improper accruals of deductions from 1942 to 1943, it is clear that the effect of the use of the accrual method of reporting income from the Delta contract would be to provide a large and fictitious loss in 1942 and an even larger and equally fictitious income in 1943.

There are many cases which hold that what might generally be an acceptable accounting method may in particular cases be unacceptable because not clearly reflecting income.

For example, in *Key Largo Shores Properties, Inc. v. Comm'r.*, 21 BTA, 1008 (1930) the petitioner had filed its income tax return for the year 1925 reporting the income from the sale of Florida real estate according to the installment method. The installment method was recognized both by statute and regulations. Under this method petitioner reported in 1925 a portion of the profit hoped to be earned. Before the tax return was filed, the taxpayer knew that no profit would result from the sale and that its mortgage was worthless. Without any examination whatever into the motives of the taxpayer for filing the original return on the

installment basis, the Board permitted the taxpayer to reverse its ground and report a loss. The Board explained the reasoning behind its decision in the following language:

“Under the Revenue Acts various methods of reporting income may be adopted by taxpayers, but all are designed to correctly reflect the true income in order that a just tax may be levied and collected. If a method used by a taxpayer does not clearly reflect income, the respondent may determine the income according to a method which in his opinion does clearly reflect it. Section 212, Revenue Act of 1926. This in itself is sufficient to demonstrate that it was not intended that taxpayers should be irrevocably bound by the election of a method of reporting when that method is erroneous. The effect in this case of requiring adherence to the basis originally adopted by the taxpayer would be to set up and tax, as income, an amount which in fact is not income. Neither administrative rules nor the forceful arguments in favor of administrative expediency can create income where in fact there is none, and, after all, it is only income that is to be taxed. In our opinion the installment basis when applied to the facts in the present case does not reflect the taxpayer’s income.”

The facts and results were similar in *Ives Dairy, Inc.* (1931), 23 BTA 579, aff’d (5th Cir., 1933), 85 F.2d 135. Normally, of course, the election of the installment method of reporting income is binding on the taxpayer. See *Pacific National Co. v. Welch* (1937), 304 U.S. 191, 58 S. Ct. 857, but also note that in this case the Supreme Court carefully pointed out that there was nothing indicating that the method originally chosen “rightly applied, * * * would not clearly reflect income.” (at p. 858)

Similarly, in *Reynolds Cattle Co.* (1934), 31 BTA 206, the taxpayer for a number of years had used the inventory basis of reporting its income from its cattle ranches. After some controversy with the Commissioner, the taxpayer’s

liability for prior years was settled on an inventory basis. Without seeking permission from the Commissioner, the taxpayer filed its returns for 1929 and 1930 on the cash basis. The Commissioner determined deficiencies, holding that the return should have been made according to the inventory method and not on the cash basis, since the Commissioner had not granted permission for the change. The Board of Tax Appeals held that the taxpayer properly reported its income on the cash basis, since the inventory basis as used by the taxpayer did not clearly reflect its income. The Board said (at page 211)

“We think the method urged by the respondent does not clearly reflect petitioner’s income. It appears that the cash receipts and disbursements method as used by petitioner does correctly reflect its income. Therefore, in view of all the circumstances, we hold that the Commissioner’s refusal to approve the cash method is an unreasonable and arbitrary exercise of his power not contemplated by the statute.”

And in a case very much like this one, *R. G. Bent Co. v. Comm’r* (1932), 26 BTA 1369, the Board of Tax Appeals concluded that the taxpayer’s income “could be accurately computed upon the completed contract basis and only estimated inaccurately upon the accrual basis.” Hence it required the taxpayer to use the completed contract basis.

Similarly, it was held in *Walter Tillman Estate* (1928), 10 BTA 4, that where accounts were so kept that taxable income could be accurately computed on the accrual basis but could not be accurately determined on the installment basis, the accrual and not the installment basis must be used.

And while the cash method of accounting is generally acceptable (Int. Rev. Code Sec. 42; Regs. Sec. 19.41-2), the authorities setting forth the circumstances under which

that method does not clearly reflect income, and thus is unacceptable, are numerous. E.g. Regs. Sec. 19.41-2; *Herberger v. Comm'r* (9th Cir., 1952), 195 F.2d 293, cert. den. 344 U.S. 820; *Caldwell v. Comm'r* (2nd Cir., 1953), 202 F.2d 112.

The reason why the completed contract method of accounting is utilized and is generally accepted as clearly reflecting income in the case of construction contracts, while the accrual method may not, was stated by this Court in *Bent v. Comm'r*. (9th Cir., 1932), 56 F.2d 99, 102-103 as follows:

“* * * But in either event the contract is a unit, and until the contract is completed and accepted, it cannot be definitely known what the profit may be or what loss may be suffered by the contractor. The books are full of instances where, by reason of defective work or unsuspected obstacles or changes in prices of labor and materials, contractors have suffered losses, notwithstanding the unit price basis and in the case of the contract based upon cost plus a fixed fee the work may be prolonged over a long period of time by reason of difficulties in the work, or the fee might be diminished or wholly lost because of inability to complete the contract. These observations, familiar to all, are made merely for the purpose of indicating that *under such contracts the income, that is the profit derived from a contract is not necessarily reflected by the payments made thereunder for a particular period*, whether such payments are upon a lump sum contract basis, or unit price basis, or cost plus a fixed fee basis.” (Italics added.)

The factors noted by the court in the *Bent* case were of course, present here at the end of 1942. More importantly, however, if the taxpayers were required to close out this contract simply by deducting accrued costs from accrued income, the returns would reflect an unrealistic loss in 1942, and, on the other hand, would reflect an unrealistic income in 1943. It cannot be said that the accrual method as thus

applied to this case would "clearly reflect the income" for either 1942 or 1943.

b) ANY "ELECTION" BY THE TAXPAYER TO ADOPT THE ACCRUAL METHOD OF ACCOUNTING WAS AN INNOCENT MISTAKE, MADE UNDER AN ERRONEOUS ASSUMPTION, AND THE TAXPAYER SHOULD BE RELIEVED OF THAT "ELECTION".

The reasons why the taxpayers reported income from the Delta contract before it was completed are in the record and have previously been discussed herein. It was done because of the demand of the army officer renegotiating the Delta contract, and because of belief that the taxpayer was required to report income for tax purposes upon the same basis as it was reported for renegotiation purposes.

The doctrine of "election", as described in the *Tide Water Oil Co.* case, cited previously, is that "in order to be bound by his election a party must have made an election with knowledge of his rights upon which the other party properly relied."

There was, of course, no reliance by the defendant upon the mistake made here in the 1942 return. On the contrary, the plaintiffs have so far been denied the right to compute their tax liability in a correct manner. But more than that, the "election" which was made by the plaintiffs was made under a most serious misapprehension of their rights, if that election required (unbeknownst to them at the time) that they report a large loss from the contract in 1942 and an even larger income from the contract in 1943. In this light, this case is like *Meyer Est. et al. v. Comm'r.* (5th Cir., 1952), 200 F.2d 592. There it was held that an election to be taxed at ordinary income rates on the earned surplus of a liquidating corporation could be revoked when the election was made under a misapprehension as to the amount of the earned surplus. Section 112(b)(7) of the 1939 Code was an optional provision permitting the dissolution of a cor-

poration without tax to the shareholders except to the extent of the earned surplus of the corporation, which was taxed as ordinary income. The taxpayer relied upon figures prepared by his accountant showing that the earned surplus was about \$80,000, but on audit the Commissioner found that the correct surplus was more than \$1,000,000. The taxpayer attempted to withdraw and rescind his election. The Court of Appeals pointed out that there was no fraud or bad faith in making the election, and therefore held that the taxpayer was not bound by it, stating:

“* * * To hold petitioner to the election under Section 112(b)(7) where Section 113(c) would have been clearly indicated but for the stipulated mistake of fact as to the large earned surplus figure would in effect convert a remedial statute enacted to aid taxpayers into a punitive statute reflecting a disproportionately harsh tax liability upon them. No such inequitable result is here warranted.”

Similar cases include *George N. Klemyer* (1930), 20 BTA 934, where the taxpayer filed returns for four years on a fiscal year basis under a misconception of the law, and it was held that the taxpayer did not, under the circumstances, thereby elect to establish a fiscal year accounting period. See also *Estate of Cyrus H. K. Curtis* (1937), 36 BTA 899, which is similar.

In Pomeroy's Equity Jurisprudence, page 512 (3rd Edition) it is stated that:

“* * * It follows that where an election has been made in ignorance or under a mistake as to the real condition and value of the properties, or under a mistake as to the real nature and extent of the party's own rights, such a mistake is regarded as one of fact, rather than of law; the election itself is not binding, and a court of equitable powers will permit it to be revoked, unless

the rights of third persons have intervened which would be interfered with by the revocation."

The above was cited by the Court in *McIntosh v. Wilkinson* (E.D. Wisc. 1929), 36 F.2d 807, determining that under the facts of that case, the filing of separate returns did not constitute a binding election.

Certainly in this case, any "election" to adopt an accrual method of accounting was an election made in ignorance of the taxpayers' rights, and a misapprehension of its consequences. If the taxpayer elected the accrual method for 1942 he should be relieved of that election and permitted, through the claims for refund and this action, the opportunity for a really fair choice. See *Morrow, Becker & Ewing, Inc. v. Comm'r.* (5th Cir., 1932), 57 F.2d 1, where the Court of Appeals said: "Taxes are assessed on income and not on honest mistakes of the taxpayer."

3. **The grounds stated in the refund claims and the basis asserted in the complaint for refund, included the specification of improper accrual of gross receipts in the amount of \$472,722.15. Thus, the Court should have permitted the correction of the error by correctly applying the accrual method.**

In the opinion of the District Court (Tr. 106), the following language appears:

"It does appear that some of the Delta contract income in fact did not accrue until 1943 and was improperly included in the 1942 return. To this extent the 1942 return was erroneous. But that error cannot be reached or corrected in this action. For plaintiffs in their refund claims and in the complaint herein sought refunds *solely on the ground that all of the Delta contract receipts had been erroneously reported as income in 1942 as a result of a mistaken application of the completed contract method of accounting.*" (Italics added.)

And in the Court's Conclusions of Law III (Tr. 111), it is stated:

“That portion of the income from the contract that actually accrued in 1943 cannot be refunded in this action because the grounds stated in the refund claims, and the basis asserted in the complaint for refund, *were solely that all of the receipts from the contract had been erroneously reported as income in 1942.*” (Italics added.)

Perhaps the District Court meant by this language that it would not even consider correction of the errors in the 1942 return, because the only error which it found (an improper application of the accrual method of accounting) was not specified in the refund claims or the complaint. Thus the District Court may not have reached the question of whether the error would be correctable by switching to the completed contract method of accounting (as is argued above) if the Court had found in the claim for refund a specification of the erroneous accrual of \$472,722.15. It is respectfully submitted that if this was the reasoning of the Court, it is fallacious. If the way in which the error should be corrected is to report none of the gross receipts) in 1942 (using the completed contract method) does it not follow that “all of the receipts from the contract had been erroneously reported as income in 1942”? This is the ground upon which the District Court found that the claim and complaint were based. Accordingly, it is submitted that the asserted insufficiency in the claims for refund and the complaint is not material unless it be concluded that the error in the 1942 return is correctable, if at all, only by shifting the receipts improperly accrued from 1942 to 1943.

As an additional preliminary matter, it seems appropriate to note that defendant did not find that the refund claims and the complaint were based “solely on the grounds * * * of a mistaken application of the completed contract method of accounting” as the District Court concluded in its

opinion. On the contrary, counsel for the defendant made the following statement in open court (Tr. 136) :

“The essence of this thing [the claim for refund] and the essence of the complaint is that the returns as filed were on the accrual basis, that they made a mistake in filing them on the accrual basis, they should have been filed on a completed contract basis because the contract was completed in 1943.”

Since the entire doctrine requiring a statement of the grounds of a claim for refund is designed to afford an opportunity for administrative adjustment without suit, and the defendant obviously understood that improper application of the accrual method was one of the grounds of the claim, this should end the matter. *Samara v. United States* (2nd Cir.), 129 F.2d 594.

Be that as it may, an examination of the refund claims and the complaint demonstrate that both the improper accrual of receipts and the improper application of the completed contract method were set forth as grounds for the refund.

Looking first to the claims for refund (as amended) which were all in the form of Exhibit No. 22 to the Stipulation of Facts (Tr. 97), we read the following (at Tr. 99) :

“The following reasons that this claim should be allowed are in accordance with the original claims which were timely filed :

“The *amended partnership returns* were filed to correct the erroneous returns which were filed for years 1942 and 1943. The *amended returns* as filed are consistent with the accounting procedure used by Daley Brothers during the year 1943 and prior. The *amended returns* are to correct the Delta, Utah, contract, which was completed in the year 1943 and erroneously included in income for the year 1942. . . .” (Italics added.)

This claim for refund is by its terms based in part upon the amended partnership returns. The law is clear that an amended return accompanied by a claim on the proper form is a proper way to set forth grounds for a claim for refund. I.T. 1450, 1-2 CB 200; *Lebolt & Co. v. U. S.* (1929), 67 Court of Claims 422; *Standard Computing Scale Co. v. U. S.* (1931), 52 F(2d) 1018. (Under the present regulations, an amended return alone is sufficient, without the necessity of also submitting the claim on Form 843. Regs. § 301.6402-3.)

In order to determine the way in which the original 1942 return was erroneous, and the way in which the amended returns "correct the erroneous returns" you would naturally look to the original and amended returns and compare them. These returns are set forth on pages 86-90 of the Transcript.

Looking on the face of the original return for 1942 (Tr. 86) we see

"1. Gross receipts from business
or profession.....\$3,655,672.28."

The testimony was that this figure was the estimated full contract price (Tr. 166). Looking next at the face of the amended return for 1942 (Tr. 88), we find on the same line the following:

"1. Gross receipts from business or
profession.....(Advances only \$3,180,536.97)."

It is readily seen that if there is added to the figure \$3,180,536.97 (shown in the amended return) the sum of \$472,722.15 (the erroneous accruals), the result is \$3,653,259.15 (which is the actual full contract price). Stip. of Facts, paragraph 8, Tr. 21. In other words, on the 1942 amended partnership return, constituting a part of the claim for refund, there was deducted from the gross receipts originally reported the amount of the improper accruals.

It should also be noted that on the amended return, in response to question No. 4, it is stated that the return was prepared on the accrual basis (Tr. 89). This is the same response that was given to this question on the original return (Tr. 87). Thus, the claim for refund specifically states, in the clearest possible manner, that one of the errors shown on the original 1942 return was that the gross receipts from business or profession had been overstated by improper accruals in a specified amount. To be sure, the amended 1942 return also states that such gross receipts should have been reported only as advances, but that is the *second* ground upon which it is asserted that the original 1942 return was erroneous.

The complaint in this case also sets forth the grounds which the District Court found to be lacking. Thus, in paragraph VI, at Tr. 9, the complaint sets forth specifically the provisions of the Delta contract providing for payments on estimates prepared by the contracting officer, and providing for a 10% holdback. *These are the provisions of the contract upon which the plaintiffs relied* in arguing in the District Court that the sum of \$472,722.15 had not been accrued by December 31, 1942.

In paragraph VII of the complaint it is alleged that "said moneys received under the contract for the Delta Venture was not income for any year until the said contract was completed as provided for in the contract, and accepted by the United States Government."

This is an assertion that neither the whole nor any portion of the moneys received (the gross receipts) of the Delta contract was earned until the contract was completed and accepted. The final progress payments and payment of the "holdbacks" (which were the amounts erroneously accrued) were both to be made only when the contract was completed

and accepted by the United States Government. See the terms of the contract set forth in the complaint at Tr. 9.

In paragraph IX of the complaint (Tr. 11) it is stated that "said income tax return was erroneously made and reported under the mistaken theory that the *income* was *earned* in the calendar year 1942. This *income* was then inadvertently reported by the plaintiffs as *income* as to their respective shares by the plaintiffs herein on their individual returns for said year." (Italics added.)

The term "income" as used in paragraph IX of the complaint should be distinguished from the term "moneys" used in paragraph VII of the complaint. As can be quickly seen from an examination of the face of the return (Tr. 86), gross receipts is not "income"; the cost of goods sold must be deducted before reaching an item of "income". Regs. § 19.22(a)-5 ("* * * 'gross income' means the total sales, less the cost of goods sold * * *"); *Uptegrove Lumber Co. v. Comm'r.* (3rd Cir., 1953), 204 F.(2d) 570. Moreover, the "income" which the complaint alleges was inadvertently reported by the plaintiffs on their respective individual returns was obviously the net income shown on the original partnership return, viz., \$206,250.44. See Schedule J of the original return (Tr. 87). Gross receipts of a partnership do not find their way to the original return. And the term "earned," used in paragraph IX, is an accrual concept, not a completed contract concept. See the language quoted from the *Fort Pitt Bridge Works* case, *supra*, pg. 9. The point is that paragraph IX of the complaint says quite clearly that the income tax return was erroneous in that income was reported in 1942 when in fact, because of improper accruals, no such income existed in 1942.

It appears that the District Court may have confused the "grounds" stated in the refund claims and the complaint

with the "relief" requested. Appellants concede that they have taken the position that the way in which the error in the 1942 return should be corrected is to shift all items of income and deduction to 1942 when the contract was completed. In other words, the completed contract method should be correctly applied. Thus, in the amended returns submitted with the claims for refund, the 1942 return showed the income and deductions accrued through December 31, 1942, as in suspension, and reported no net income or loss (Tr. 88). And the amended return for 1943, when the contract was completed, reported the full contract price and all expenses and the net profit therefrom (Tr. 90, 91). This is the proper way of reporting income for tax purposes on the completed contract method of accounting. *Fort Pitt Bridge Works v. Comm'r.* (supra, p. 9).

Similarly, the amount of refunds requested in the complaint (Tr. 13) were based on the amounts requested in the claims for refund, which, as already stated, were computed on the completed contract method.

But simply because a taxpayer asks for a greater refund than that to which he is entitled is not sufficient grounds upon which to deny him the refund to which he is entitled. See Rule 54(c) of the Federal Rules of Civil Procedure:

"Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

See also *Agarano v. U. S.* (D.C. Hawaii, 1953), 110 F. Supp. 609.

Thus, if this court determines that the plaintiffs adopted the accrual method of accounting, and that they are not entitled to correct the error in the 1942 return by using the completed contract method, it is respectfully submitted

that they are nevertheless entitled to a reversal with instructions that computations be made on the basis of the accrual method of accounting, pursuant to the Supplemental Stipulation of the parties (Tr. 101).

If this Court considers that the claim for refund may not have given adequate notice of the contentions of plaintiffs, then it is requested that the case be remanded to the District Court for further proceedings. Plaintiffs are prepared to submit documentary and other evidence which will prove that both before and after filing the complaint herein, accountants and counsel for plaintiffs met frequently with representatives of defendant, and submitted evidence and legal memorandum to them, in an effort to convince them that even on the accrual method of accounting no income would have been reported on the 1942 return. Representatives for the defendant consistently took the position that the 1942 return was substantially correct on the accrual method of accounting, and never objected to the form of the claim for refund in this or any other respect. The defendant, through its representatives, consistently maintained the same position which the courts recently held to be erroneous in the *Dally* and *Harmon* cases (*supra*, pg. 10). Based upon the defendant's brief in the District Court, it does not appear that they have *yet* conceded that the 1942 return was in error on the accrual method of accounting. There thus was no surprise, no failure of opportunity to dispose of this case on the administrative level. On the contrary, by the failure of the defendant to raise any objection to the form of the claim for refund in the Answer (Tr. 13), or at the trial, the appellants were surprised and aggrieved, and are entitled to a remand for the purpose of proving waiver of any defect which existed. (As to waiver of defects in claims for refund see *Angelus Milling Co. v. Comm'r* (1945), 325 U. S. 293, 65 S. Ct. 1162; *Union Trust Co. of Pittsburgh et al. v.*

McCaughn (D.C. Penn., 1927), 24 F.2d 459; *Foster Box Board Co. v. Clarke*, 7 F. Supp. 682, aff'd (2nd Cir., 1937), 90 F.2d 1008; *Lehigh & Wilkes-Barre Coal Co. v. U. S.* (D.C. Penn., 1930), 38 F.2d 637. As to the requirement that an objection to the form of the claim for refund be pleaded specifically in the answer, see *Howbert v. Penrose* (10th Cir., 1930), 38 F.2d 577 and *Northwestern Nat. Bk. & Trust Co. of Minn. v. U. S.* (D.C. Minn., 1942), 46 F. Supp. 390, aff'd 137 F.2d 761.

CONCLUSION

After many years of following a consistent accounting practice of reporting income on the completed contract method, Appellants were asked by a renegotiation officer and an agent of the defendant herein, in connection with the first renegotiation which they had undergone, to treat a large contract which was almost completed as if it had been completed at the end of 1942. Appellants complied against their wishes and without any anticipation of gain therefrom. On the contrary, in closing out the books on the contract prior to its completion and making out their tax return accordingly, the appellants made errors which resulted in large increases in the income taxes which they paid. Under any standards of justice and equity, appellants should be entitled to recompute their liability for income taxes on the basis of standards applicable to all other taxpayers.

The technical merits of the appellants' case are equally strong. Despite the fact that the books of account were closed before the Delta contract was completed, the accounting "method" employed was the completed contract method, and the Conclusion of Law of the District Court to the contrary is clear error. Accordingly, appellants are entitled to recompute their taxes by correctly applying the completed contract method. Even if by closing the Delta con-

tract before its completion the taxpayers converted the completed contract method into some other method of accounting, they nevertheless are entitled to recompute their liability by using the completed contract method, since that is the only method which, under the circumstances of this case, would "clearly reflect the income."

In any event the District Court was in error in failing to allow the appellants to correct the 1942 return by shifting the erroneous accruals from 1942 to 1943. These errors were clearly proven on the basis of stipulated facts, and to the satisfaction of the District Court. The claims for refund and complaint set forth the existence of these errors as one of the grounds for refund. The fact that the plaintiffs also alleged other errors, and asked for a greater refund than that to which the District Court found they were entitled, is not a sufficient basis upon which to deny the plaintiffs any recovery whatever.

The District Court should be reversed, with instructions to enter judgment for appellants, based upon computations made pursuant to the Supplemental Stipulation of the parties (Tr. 101) and in accordance with the opinion of this Court.

Dated: November 29, 1956.

Respectfully submitted,

ERIC SUTCLIFFE
WILLIAM D. MCKEE
ORRICK, DAHLQUIST, HERRINGTON
& SUTCLIFFE

Attorneys for Appellant

(Appendix Follows)

Appendix

RENEGOTIATION ACT

Section 403(c)(5) of the Sixth Supplemental National Defense Appropriation Act, 1942, Pub. L. No. 528, 77th Cong. 2d Sess., April 28, 1942, as amended by Pub. L. No. 753, 77th Cong., 2d Sess., October 21, 1942:

“(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.”

RENEGOTIATION PROCEDURES

Excerpt from "Introduction to the Renegotiation Regulations" (Commerce Clearing House War Law Service, Government Contracts, page 2905) (1944):

"5. Development of Procedure for Renegotiation.

"The scope of the statute molded its administration. Under the Act, renegotiation applied to all contracts and subcontracts (with specified exceptions), and could be required after the contract had been completed. These provisions seemed to render contractors liable, until three years after the war, to refund such part of any profits earned by them on their war contracts or subcontracts as the procuring agency might require. Since the prices of all contracts and subcontracts subject to the statute obviously could not, within any reasonable period, be examined and renegotiated individually, some other means had to be developed for disposing of this potential liability.

"These circumstances led to the adoption of the method of overall renegotiation. This procedure permitted the contractor's profits on his entire war business to be examined for a specific fiscal period in order to reach an agreement for eliminating excessive profits on such contracts as a group and for that period. Besides reducing the administrative burden, this procedure had several other advantages. The consideration of all contracts and subcontracts as a group reduces cost accounting and allocations of cost to a minimum and saves time for both contractors and the Government, and the use of the fiscal period for renegotiation facilitated the use of the regular financial and accounting material of contractors and avoided the preparation of such data on an entirely different basis. In addition, this method allowed the contractors to offset their losses on one or more war contracts against their profits from other war contracts during the same period.

"In October, 1942, Congress adopted certain amendments proposed by the Departments primarily to confirm the procedures developed in practical administration of the statute."

RENEGOTIATION REGULATIONS

Renegotiation Regulations of the War Contracts Price Adjustment Board, Title 32, Code of Federal Regulations, Parts 1601-1608 (Supplement 1944):*

301.1 *Statutory Provisions.* Subsection (c) (1) of the Renegotiation Act of 1943 provides in part:

"* * * The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcontractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or subcontractor."

301.2 *Use of Fiscal Year Basis—In General.*

(1) This provision requires the War Contracts Board to renegotiate on a fiscal year basis (or such other period as may be fixed by mutual agreement). It also requires that renegotiation be conducted upon an over-all basis unless the contractor or subcontractor requests, and the War Contracts Board agrees, that such renegotiation be conducted

*While Renegotiation Regulations were not promulgated until after renegotiation of the Delta contract, they are believed to represent, in substance, the procedures used theretofore. See "Renegotiation Procedures", Appendix pg. 2.

with respect to his contracts and subcontracts separately or as two or more groups.

(2) Generally, renegotiation will be conducted on the basis of the amounts received or accrued by a contractor from his renegotiable contracts and subcontracts for a past fiscal year. Under this method excessive profits are determined by examining the contractor's financial position and the profits from such contracts and subcontracts taken as a whole for a particular fiscal year rather than by separate analysis of each contract or subcontract. This avoids problems of allocation of costs and profits, as between each contract and subcontract, allows the contractor to offset the results of one contract against another and simplifies administration.

301.3 *Renegotiation on a Completed Contract Fiscal Year Basis—Construction Contracts.*

(1) Contractors having construction contracts or subcontracts may have used a completed contract method of accounting for Federal income tax purposes with respect to some or all of such contracts or subcontracts. With respect to the contracts and subcontracts for which the completed contract method of accounting was used, such method of accounting will be followed for all purposes of the Renegotiation Act and the regulations and interpretations promulgated thereunder. In the case of any contract or subcontract for which the completed contract method of accounting is followed, all amounts received or accrued thereunder and all costs paid or incurred with respect thereto will be treated as having been received or accrued or paid or incurred within the fiscal year in which the contract or subcontract was completed.

(2) A contractor who has used the completed contract method of accounting for Federal income tax purposes with

respect to some of his construction contracts and subcontracts and who desires the use of such method with respect to his other construction contracts and subcontracts, or a contractor who has not used such method of accounting for Federal income tax purposes with respect to any of his contracts or subcontracts, may, nevertheless, request that the completed contract method of accounting be used for the purposes of renegotiation with respect to all of his construction contracts and subcontracts completed or terminated within the fiscal year. If such request is approved by the Department to which the contractor has been assigned, the contractor will be deemed to have adopted the completed contract method of accounting with respect to such contracts and subcontracts, for the purposes of renegotiation. The form to be used in making such a request is set forth in paragraph 723. The Department concerned will not approve such request unless (a) it appears that the effect of granting such a request would not be inconsistent with the general purposes of the Act, (b) the contractor agrees to all the terms and conditions stated in paragraph 723, and (c) the request relates to all construction contracts and subcontracts completed or terminated within the fiscal year being renegotiated. If such request is approved, the Renegotiation Act, and the regulations and interpretations promulgated thereunder other than those dealing with the allowance of tax credits, will be applied in all respects to such construction contracts and subcontracts and the profits derived therefrom as though, with respect to them, the contractor had used the completed contract basis of accounting in keeping his books and in making his Federal income tax return. The \$500,000 fiscal-year exemption provided in subsection (c) (6) of the Renegotiation Act, the interpretation relating to the \$500,000 "floor" as set forth in paragraph

348.3, as well as all other provisions of the 1943 Act, will be applied in like manner. The contracts or subcontracts renegotiated on the completed contract basis are subject to such separate treatment as may be required because of the different types of contracts involved (such as fixed-price, cost-plus-fixed-fee, price-minus contracts, contracts subject to contractual or statutory fixed profit limitations and contracts providing for redetermination or revision of the contract price during the life of the contracts). In this connection, attention is directed to paragraphs 306 and 307.

301.6 *Contracts to Be Included in a Completed Contract Renegotiation.* Subject to the provisions of subparagraph 301.3 (2) with respect to separate treatment of different types of contracts, contracts and subcontracts to be renegotiated on a completed contract basis will be renegotiated as a group when completed within a given fiscal year, but contracts completed in one fiscal year may not be grouped with contracts completed in a different fiscal year.

No. 15,181

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN P. DALEY, MINERVA B. DALEY,
MORRIS DALEY, ZELMA B. DALEY,
WILLIAM RADTKE, CLARA RADTKE
and HOMER BOSSE, Trustee of the
Estates of Morris K. Daley, Alice M.
Daley, Susan R. Daley, James D.
Daley, Kathryn F. Daley and Peter
D. Daley,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court
for the Northern District of California.

BRIEF FOR THE APPELLEE.

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
SHELDON I. FINK,
Attorneys, Department of Justice,
Washington 25, D.C.

LLOYD H. BURKE,
United States Attorney.

LYNN GILLARD,
Assistant United States Attorney.

FILED

JAN 11 1957

PAUL P. O'BRIEN, CLERK

Subject Index

Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and other authorities involved	4
Statement	4
Summary of argument	8
Argument	13
I. The District Court correctly held that taxpayers elected to report the income from the Delta contract by means of the accrual method	13
II. Taxpayers cannot, in this action, correct the Delta War Venture's accrual computation, inasmuch as taxpayers' claims for refund and complaint were based upon a different ground	32
Conclusion	40
Appendix	

Table of Authorities Cited

Cases	Pages
Aluminum Castings Co. v. Routzahn, 282 U. S. 92	24
Badgley v. Commissioner, 21 B. T. A. 1055	18
Black, E. E., Ltd. v. Alsup, 211 F. 2d 879	17
Blum Folding Paper Box Co. v. Commissioner, 4 T. C. 795	39
Brown v. Helvering, 291 U. S. 193	16
Cherokee Textile Mills v. Commissioner, 5 T. C. 175	39
Clark v. Woodward Construction Co., 179 F. 2d 176	16
Commissioner v. Saunders, 131 F. 2d 571	31
Daley v. United States, 139 F. Supp. 376	1
Dally v. Commissioner, 20 T. C. 894, affirmed, 227 F. 2d 724, certiorari denied, 351 U. S. 908	26, 29, 39
Fort Pitt Bridge Works v. Commissioner, 92 F. 2d 825	17
Fowler Bros. & Cox v. Commissioner, 138 F. 2d 774	28
French v. Smyth, 110 F. Supp. 795, affirmed sub nom., French v. Berliner, 218 F. 2d 351	32
Nemours Corp. v. United States, 188 F. 2d 745	33
Niles Bement Pond Co. v. United States, 281 U. S. 357	15
Rossin, S., & Sons v. Commissioner, 113 F. 2d 652	28
Samara v. United States, 129 F. 2d 594	32
Security Mills Co. v. Commissioner, 321 U. S. 281	31
Spring City Co. v. Commissioner, 292 U. S. 182	16
United States v. Garbutt Oil Co., 302 U. S. 528	39
Williams, J. H., & Co. v. United States, 46 F. 2d 155	35

Statutes

Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, Sec. 6	2, 23
Internal Revenue Code of 1939:	
Sec. 41 (26 U.S.C. 1952 ed., Sec. 41)	15, 16, App. i
Sec. 42 (26 U.S.C. 1952 ed., Sec. 42)	16, App. i

TABLE OF AUTHORITIES CITED

iii

	Pages
Sec. 43 (26 U.S.C. 1952 ed., Sec. 43)	16, App. ii
Sec. 322 (26 U.S.C. 1952 ed., Sec. 322)	39

Miscellaneous

32 Code of Federal Regulations, c. XIV (1944 Supp.), Sec. 1603.302	22, App. x
Federal Rules of Civil Procedure:	
Rule 52	15
Rule 54	3
I. T. 3459, 1941-1 Cum. Bull. 236	29, App. vii
2 Mertens, Law of Federal Income Taxation, Sec. 12.134 ...	18
Treasury Regulations 111:	
Sec. 29.41-1	16, App. ii
Sec. 29.41-2	16, App. iii
Sec. 29.42-4	17, App. v
Sec. 29.43-1	App. vi

No. 15,181

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN P. DALEY, MINERVA B. DALEY,
MORRIS DALEY, ZELMA B. DALEY,
WILLIAM RADTKE, CLARA RADTKE
and HOMER BOSSE, Trustee of the
Estates of Morris K. Daley, Alice M.
Daley, Susan R. Daley, James D.
Daley, Kathryn F. Daley and Peter
D. Daley,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court
for the Northern District of California.

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The decision of the District Court (R. 102-112) is
reported at 139 F. Supp. 376.

JURISDICTION.

This appeal involves federal income taxes. The tax
returns in dispute were filed March 15, 1943, for the

calendar year 1942. (R. 22-23.) Claims for refund, based upon the operation of Section 6 of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, were filed on March 15, 1947, for the years 1942-1943. (R. 23-24, 93-95.) Amended claims for refund were filed on April 9, 1951 (R. 23-24, 97-99) in the total amount of \$77,782.78 (R. 12-13). The original and amended claims were rejected on March 21, 1952. (R. 96, 100.) Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on August 20, 1952, taxpayers brought an action in the United States District Court for the Northern District of California for recovery of the taxes paid. (R. 3-13.) Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. The judgment was entered on March 23, 1956. (R. 112-113.) Within sixty days and on May 22, 1956, a notice of appeal was filed. (R. 114.) Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

QUESTIONS PRESENTED.

1. John P. Daley and Morris Daley had been engaged in the construction business as partners for several years, reporting income on the completed contract basis. In 1942, they formed Daley Brothers, Limited, which, in turn, entered into a separate partnership or joint venture with William Radtke to perform a Government construction contract. The contract was completed in February, 1943. The joint venture submitted a federal income tax return for the

calendar year 1942, computing income by the accrual method of accounting and reporting the entire receipts from the contract. In 1947, claims for refund were filed attempting to shift the income from the contract, originally reported in 1942, to 1943, a year in which taxpayers sustained losses, to take advantage of these losses and the forgiveness provisions of the Current Tax Payment Act of 1943. The basis of the claims was that the venture had in fact adopted the completed contract method of accounting in 1942 and had erroneously reported the contract receipts in 1942, rather than 1943, when the contract was completed. The question presented is whether the District Court erred in finding that the venture intentionally elected to compute the income from the contract by means of the accrual method of accounting and did, in fact, adopt that method, rather than the completed contract method, for purposes of reporting its 1942 income tax liability.

2. Taxpayers claim, in the alternative, that since they have been held to have reported the joint venture income on the accrual basis in 1942, they should be permitted to correct alleged errors in the accrual computation, whereby they included, in 1942 income, amounts of income which did not accrue until 1943 and should, therefore, have been reported in 1943 rather than 1942. The additional question is thus presented as to whether the taxpayers can, in this action, correct the joint venture's accrual computation, inasmuch as the taxpayers' claims for refund, amended tax returns, complaint, evidence and District Court

brief were all based on a different ground (i.e., that *all* of the contract receipts had been erroneously reported as income in 1942 as a result of a mistaken application of the completed contract method) and the question of the adjustment of the accrual computation is urged for the first time on appeal.

STATUTES AND OTHER AUTHORITIES INVOLVED.

The statutes and other authorities involved are set forth in the Appendix, *infra*.

STATEMENT.

The facts as found by the District Court (R. 107-110) and as stipulated (R. 16-24) may be summarized as follows:

John P. Daley and Morris Daley since 1935 were engaged in the general contracting business, as co-partners, operating under the firm name of Daley Brothers. During this time they reported their income on the completed job basis of accounting. On June 30, 1942, the brothers, and their respective wives, executed identical trust agreements for the benefit of their children, differing only as to the beneficiaries, naming Homer Bosse as trustee. On the same date a new, limited partnership was created, composed of John P. Daley and Morris Daley, as general partners, and Homer Bosse, trustee, as limited partner, and the business was continued as Daley Bros., Ltd. On

July 8, 1942, the limited partnership entered into a Government contract (War Department Contract No. W-2195-eng-247), taken in the name of Daley Bros., for the construction of a Japanese Relocation Center at Delta, Utah. Upon the securing of this contract (hereinafter called the Delta contract), Daley Bros., Ltd., entered into a special partnership or joint venture with William Radtke, known as the Daley Brothers Delta War Venture (hereinafter called the Delta War Venture), for the purpose of performing the contract. (R. 18-19, 108.) It is the accounting treatment of the proceeds of the Delta contract by the Delta War Venture which is here in issue.¹

The Delta contract called for a lump sum consideration of \$2,834,212.51 and was to be completed on or before September 6, 1942. (R. 19.) It provided for periodic progress payments to be made at the end of each month, based on estimates made and approved by the Government contracting officer. It further provided that ten per cent of each payment would be retained by the Government until final completion and acceptance of all work under the contract. (Stip. Ex. 1; R. 19, 45.) A series of supplemental agreements increased the consideration to its final amount of \$3,653,259.12 and extended the date of completion

¹Appellants in this case are John P. and Minerva B. Daley, husband and wife; Morris and Zelma B. Daley, husband and wife; William and Clara Radtke, husband and wife, and Homer Bosse, trustee of the estates of Morris K., Alice M., Susan R., James D., Kathryn F. and Peter D. Daley, all of whom are joined herein as a result of filing individual income tax returns reflecting shares of income from the Delta War Venture. (R. 17-18, 22-24.) Hereinafter, the appellants will sometimes be referred to as taxpayers.

to February 16, 1943. (R. 19-21.) The Delta contract was completed and the work accepted by the Government as of February 16, 1943, although certain matters, including final payment, were not finally settled until a later date. (R. 21, 108-109.)

The Delta War Venture filed a separate partnership income tax return for the period June 1, 1942, to December 31, 1942, reporting gross income from the Delta contract of \$3,655,672.28 and net income of \$206,250.44, distributing such net income as follows: Daley Brothers, limited partnership, \$144,166.96 and William Radtke, \$62,083.48. (Stip. Ex. 18; R. 22, 86-87.) The amount reported in 1942 by the Delta War Venture was the full contract price of the Delta contract. (R. 109, 110.)

In 1947, the Delta War Venture filed amended partnership income tax returns for 1942 and 1943, in which it reported no income from the Delta contract in 1942 and the entire receipts from the contract in 1943. Along with these amended partnership returns, taxpayers filed claims for refund and amended individual tax returns reflecting the changes made by the partnership returns. (R. 109-110.)

The claims for refund asserted that the amended income tax returns filed in 1947 were consistent with the accounting procedure followed by Daley Brothers during 1943 and prior years (i.e., the completed contract method) and were to correct the reporting of the income from the Delta contract which was completed in 1943 and erroneously included in income for

the year 1942. (R. 94, 99, 109-110.) Upon rejection of these claims (R. 96, 100), taxpayers filed a complaint in the District Court alleging that the accountant for Daley Brothers acted under the mistaken assumption that the monies received under the Delta contract were income for the year 1942 and that such monies were not income for any year until the contract was completed and accepted (completion and acceptance not being made until 1943). The complaint further alleged that at the end of the calendar year 1942 an income tax return was made for the special partnership, notwithstanding the fact that the contract was not completed and accepted before December 31, 1942, and that the tax return for 1942 was erroneously made and reported under the mistaken theory that the income was earned in 1942. (R. 10-11.)

The District Court found that all the income from the contract was intentionally reported as accruing during 1942 and the accrual method of accounting was elected by the Delta War Venture. (R. 109, 110.) The court further concluded that taxpayers, in their refund claims and complaint, sought refunds solely on the ground that all of the contract receipts had been erroneously reported as income in 1942 as a result of a mistaken application of the completed contract method of accounting and that, therefore, any error resulting from a mistaken application of the accrual method cannot be reached or corrected in this action. (R. 104-105, 106, 111.) Accordingly, the court held that taxpayers were not entitled to any recovery and dismissed the complaint. (R. 111.)

SUMMARY OF ARGUMENT.**I.**

Daley Bros., Ltd., entered into a special partnership with William Radtke to perform a Government construction contract. The contract was originally scheduled to be completed on September 6, 1942, for a fixed fee of \$2,834,212.51, but several change orders extended the completion date to February 16, 1943, and the contract price to \$3,653,259.12. The contract was completed and accepted on February 16, 1943, although certain matters were not finally settled until the following September. The special partnership reported all the receipts from the contract in its 1942 tax return as income for that year.

In 1947, taxpayers filed claims for refund and amended tax returns, which were disallowed by the Commissioner, reporting no income from the contract in 1942 and all of the receipts from the contract as income in 1943. In their suit for refunds, taxpayers claimed they in fact elected to report the contract income by the completed contract method and erroneously applied that method in reporting the income in 1942, since the contract was not completed until 1943. The Government contended that taxpayers intentionally elected to adopt the accrual method and may not now change to the completed contract method merely to shift income from 1942, a year of gain, to 1943, a year in which taxpayers sustained losses. The District Court held that taxpayers intentionally elected to report their income on the accrual basis. The question of whether taxpayers elected the accrual basis or the

completed contract basis is one of fact and the findings of the District Court should not be disturbed unless clearly erroneous.

The applicable statutory provisions and Regulations authorize persons whose income is derived from "long term" construction contracts to elect either the accrual basis or the completed contract basis as the method upon which they may report their income. Under the accrual method, income is reported, and deductions are taken, in the period in which the right to receive payment, or the liability to pay, becomes fixed; under the completed contract method, income and expenditures with respect to a particular contract are reported in the period in which the contract is completed. In comparing the two methods, the day-to-day recording of income and expenditures may be done by the accrual or some other method and yet either the accrual or completed contract method may be elected to report the net profit for a particular period. The facts surrounding the election are, therefore, of primary importance in determining which method was employed. The facts in this case clearly indicate that taxpayers did not elect to report the special partnership income on the completed contract basis and did, in fact, elect to utilize the accrual basis and the District Court was correct in so holding.

During the year, books were kept on the accrual basis. More important, the facts surrounding the point of election, i.e., the end of the calendar year, indicate that taxpayers could not have had the slightest doubt that the contract was not completed until 1943. Tax-

payers' accountant testified that he thought the contract was completed in 1942 and reported the income therefrom on the completed contract basis; the District Court properly held that, under the facts of this case, such testimony was not credible. In addition, both taxpayers and the accountant were perfectly aware that, under the completed contract method, income from the contract was not to be reported until the contract was completed and accepted. The fact that all the parties knew that the contract had not been completed in 1942 and that, under the completed contract method, such income should not be reported until the year of completion, is strong proof that the completed contract method was not utilized. It is inconceivable, in face of such obvious facts, that taxpayers reported the contract income in 1942 and yet elected to employ the completed contract method. The alleged error committed with respect to utilization of the completed contract method (i.e., the reporting of the contract income before the contract was completed or even considered so by the taxpayers) is so striking and obvious as to suggest that it did not occur at all and that the taxpayers did not elect the completed contract method.

In addition to the proof that taxpayers did not elect to employ the completed contract method, the fact which they had the burden of establishing, there is affirmative evidence to support the District Court's finding that the income from the contract was intentionally reported as accruing during 1942. Taxpayers, on January 26, 1943, filed a form with the United

States Department of Engineers, on which they clearly indicated that the basis used for reporting the income from the contract for income tax purposes was the accrual, and not the completed contract, basis. Taxpayers' subsequent efforts, years later, to explain away this clear and contemporaneous documentary expression of intent lack plausibility. Taxpayers, on the special partnership tax return itself, indicated the accrual basis was used; in addition, Mr. John P. Daley wrote to Mr. Radtke, on December 31, 1942, setting forth the latter's specific share in the profits, as of that date, a fact indicating profits were computed on the accrual basis, at the end of the accounting period and prior to completion of the contract.

The accounting and other evidence set forth by taxpayers does not prove that they elected to employ the completed contract basis nor does it prove they did *not* elect to utilize the accrual basis. As the District Court noted, the most it shows is that taxpayers erroneously computed their income for 1942, electing the accrual method, but misapplying it.

Taxpayers also argue that if they did not elect the completed contract method, then the method utilized, be it accrual or otherwise, is unacceptable in this case since it does not clearly reflect the income of the special partnership and they should be allowed to utilize the completed contract method, which is the *only* method that will clearly reflect income. This contention improperly assumes that the method employed by taxpayers reports income that was not earned at all in 1942 and also improperly assumes

that the accrual methods will not clearly reflect income. The accrual method is a recognized and accepted method of reporting income from a fixed-fee contract, with periodic partial payments and, if properly applied, will correctly allocate the profit or loss of a taxpayer earning income under such a contract to the proper year. It appears that certain errors were made in the accrual computation, but if these were corrected, it is submitted that the accrual method would clearly reflect the income from this contract for the year 1942. The record does not provide a factual basis for computing the correct income under the accrual method and, in addition, as discussed in Point II, taxpayers are precluded from correcting the accrual computation in this action.

Finally, taxpayers' argument that their election to report on the accrual basis was an innocent mistake, from which they should be relieved, is without merit, there being no misapprehension on the part of the taxpayers with respect to the law or their rights thereunder.

II.

Taxpayers claim, in the alternative, that since they have been held to have reported the special partnership income on the accrual basis, they should be permitted to correct asserted errors in the accrual computation. The District Court noted that, although such errors apparently existed, they could not be corrected in this action. The District Court was correct in this conclusion, since a taxpayer may not urge, as a basis

for recovery in a tax refund suit, any ground which was not set forth in his claim for refund. In this case, the claims for refund, amended tax returns, complaint, evidence and taxpayers' District Court brief were all based on the ground that all of the contract receipts had been erroneously reported as income as a result of a mistaken application of the completed contract method and should have been reported in 1943, when the contract was completed. Taxpayers cannot now claim recovery based on the ground that they incorrectly calculated their income on the accrual basis. Since this latter ground was at no time in issue, the District Court's observations with respect to the erroneous accrual computation might even be deemed dicta and the taxpayers are actually raising the question for the first time on appeal. Taxpayers cannot urge as a ground for reversal an issue which they raise for the first time on appeal.

ARGUMENT.

I.

THE DISTRICT COURT CORRECTLY HELD THAT TAXPAYERS ELECTED TO REPORT THE INCOME FROM THE DELTA CONTRACT BY MEANS OF THE ACCRUAL METHOD.

On July 8, 1942, Daley Bros., Ltd. (a limited partnership, which had been formed on June 30, 1942, and was comprised of John P. Daley and Morris Daley, general partners, and Homer Bosse, limited partner), entered into a construction contract with the United States to construct a Japanese Relocation

Center at Delta, Utah. Upon securing this contract, the limited partnership entered into a special partnership, or joint venture, with William Radtke, called the Daley Brothers Delta War Venture, for the purpose of performing this contract. The contract was originally scheduled to be completed on September 6, 1942, for a fixed fee of \$2,834,212.51, but several supplemental agreements and change orders extended the completion date (which finally, on December 5, 1942, was extended to February 16, 1943) as well as increased the contract price to \$3,653,259.12. The contract was in fact completed and accepted as of February 16, 1943, although certain matters were not finally settled until September, 1943. The Delta War Venture filed a partnership income tax return for the year 1942 in which it reported as income all of the receipts from the Delta contract.

In 1947, taxpayers filed amended returns for the Delta War Venture for the years 1942 and 1943, reporting no income from the contract in 1942 and all of the receipts from the contract as income in 1943. Along with these amended returns, taxpayers filed claims for refund and amended individual returns, reflecting the shifting of the income from the Delta contract from 1942 to 1943. (R. 22-23, 103-104.)

The sole question presented to the District Court in this case was whether the taxpayers elected to report the income from the Delta contract, in the return of the Delta War Venture, by means of the accrual method of accounting or by the completed con-

tract method of accounting. The Government contended that taxpayers intentionally elected to adopt the accrual method and may not now change to the completed contract method; taxpayers claimed that they had in fact elected to report the income by the completed contract method and erroneously applied that method in reporting the income in 1942, since the contract was not completed until 1943. (R. 104-105.) The District Court found that all of the income from the contract was intentionally reported as accruing during the year 1942 and concluded that the Delta War Venture elected to report the income from the contract for the year 1942 on the accrual basis of accounting. (R. 110, 111.) The question of whether taxpayers elected the accrual method or the completed contract method is purely factual and the findings of the District Court in that respect should not be disturbed unless clearly erroneous. Federal Rules of Civil Procedure, Rule 52(a). See *Niles Bement Pond Co. v. United States*, 281 U. S. 357, 360.

The general rule with respect to methods of accounting for income tax purposes is that the net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer. If the method does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. Sec. 41, Internal Revenue Code of 1939 (Appendix, *infra*). The statute further provides that the

amount of all items of gross income shall be included in the gross income for the taxable year in which received, unless, under methods of accounting permitted under Section 41, any such amounts are to be properly accounted for as of a different period. Sec. 42(a), Internal Revenue Code of 1939 (Appendix, *infra*). Finally, deductions are to be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon which the net income is computed, unless, in order to clearly reflect the income, the deductions should be taken as of a different period. Sec. 43, Internal Revenue Code of 1939 (Appendix, *infra*).

It is elementary that these statutory provisions, and the Regulations promulgated thereunder,² recognize and authorize the two principal methods of recording and reporting items of income and expense, i.e., the "cash" method and "accrual" method. Under the "cash" method, income is reported in the year of actual receipt and deductions are taken in the year of actual expenditure. Under the "accrual" method, income is reported in the period in which the right to receive the cash or property accrues or becomes fixed, irrespective of the time of actual receipt. Similarly, deductions are taken in the period in which they were incurred, i.e., when the liability to pay becomes fixed, even though payment is not presently due and irrespective of the period of actual payment. *Spring City Co. v. Commissioner*, 292 U. S. 182; *Brown v.*

²Treasury Regulations 111, Secs. 29.41-1 and 29.41-2 (Appendix, *infra*).

Helvering, 291 U. S. 193; *Clark v. Woodward Construction Co.*, 179 F. 2d 176 (C. A. 10th). In addition to these principal methods, persons whose income is derived in whole or in part from “long-term” building, installation or construction contracts may elect to report the gross income from such contracts either upon the basis of the *percentage of completion* of the contract or upon the *completed contract* basis (in which the gross income from the contract is reported in the period the contract is finally completed and accepted and the expenditures during the life of the contract, and allocable thereto, are deducted in the same period).³ Treasury Regulations 111, Sec. 29.42-4 (Appendix, *infra*).

It should be noted, in comparing the accrual and completed contract methods of accounting, that the primary accounts for income and expense items may be *recorded* as a day-to-day matter by one method or the other—the essential difference between the two methods is in the election as to when the recorded items are to be carried into profit and loss for the particular period and reported. Thus, under the completed contract method, although items of income and expense are recorded in the primary accounts when accrued or incurred, such items are not carried into profit and loss (and the tax return for a particular year) until the contract is completed. *Fort Pitt Bridge*

³This Court has held that this regulation must be interpreted literally and income computed on the completed contract basis must be reported when completed and accepted, not merely when substantially completed. *E. E. Black, Ltd. v. Alsup*, 211 F. 2d 879 (C.A. 9th).

Works v. Commissioner, 92 F. 2d 825 (C.A. 3d); *Badgley v. Commissioner*, 21 B. T. A. 1055, 1058-1059; 2 Mertens, Law of Federal Income Taxation, Sec. 12.134. Since it is not inconsistent to say that the primary recording of the financial data is done on an accrual basis, but the profit and loss determined on either the accrual or completed contract basis, as the taxpayer elects, it is necessary to view the facts surrounding the point of election of one method or another for purposes of determining and reporting the income, rather than the method employed in the day-to-day recording of the income and expense items.

Without discussing the entries made to set up the contract on the books and record the various items of income and expense *during* the year in detail, the testimony of taxpayers' own expert witness, who also supervised the books of account in the years in question, clearly indicates that such entries were made on the accrual basis. (R. 216, 224, 233-235.) More important, the facts indicate that taxpayers elected to determine the profits of the Delta War Venture on the accrual basis and clearly did not intend to determine and report such income on the completed contract basis.

As the District Court noted (R. 105-106, 110), at the time the tax return was filed the taxpayers could not have had the slightest doubt that the contract was not completed until 1943. As of December 5, 1942, the contract had been extended an additional seventy-three days, to February 16, 1943, by a change order, a fact which had been acknowledged by John

P. Daley, on December 5. (Stip. Ex. 12; R. 77-78.) Taxpayers received, and acknowledged, on April 27, 1943, a letter from the contracting officers of the Corps of Engineers stating the contract was accepted and completed as of February 16, 1943, a fact which corroborates the position that taxpayers knew, as of the time the return was filed, that the contract was not completed until 1943. (Ex. D; R. 196-197.) Finally, John P. Daley testified (R. 203) that he personally did not consider the job was done from the point of view of a completed contract until as late as September, 1943, because of certain adjustments which had to be made concerning an item of lumber. He expressly stated, with respect to the status of work under the contract on December 31, 1942, that (R. 149-150) the work had not been accepted and there were a number of miscellaneous items which were not yet completed. In addition, Mr. Daley clearly indicated he realized that profits were not to be reported, under the completed contract method, until the work was completed and accepted. (R. 188.)

Taxpayers' certified public accountant, who checked and supervised the records and many of the entries, closed the books and made out the tax returns in the years in question (R. 218), and who clearly knew that the profits of a contract were not to be reported under the completed contract basis until the contract was completed (R. 213-214), testified that the completed contract method was used to determine the profit from the Delta contract (R. 217). He testified that he made the closing entries because he was under the

impression that the contract had been completed in 1942, having had information that the job had been completed. (R. 219, 222, 227.) However, the accountant was unable to give any credible testimony as to what information he had received; he stated it was his recollection that all the equipment and persons of authority had been returned to San Francisco in November or December (R. 221, 240),⁴ and that somebody had informed him that the work had been completed (R. 221). It would seem logical that both the information that a large contract had been completed and the authority to report the profits on the completed contract basis at that time would come, if at all, from one of the taxpayers. In view of the fact that taxpayers clearly did not consider the contract completed, the accountant's assertions seem to lack credibility and the District Court was correct in so holding. (R. 106.) An additional fact that indicates the accountant knew the contract was not in fact completed in 1942 is that certain amounts were included in the gross receipts from the contract even though they represented increases in the contract price which first arose in change orders issued *in 1943* (R. 21, 222-223); it would seem that the accountant, who supervised the books and made the closing entries, would be aware of this fact.

While it is true, as taxpayers state (Br. 16), that the fact that all the parties knew the contract had not

⁴This information seems completely in conflict with the fact that the completion date of the contract had been extended in December for an additional seventy-three days, presumably at the request of taxpayers.

been completed in 1942 does not affirmatively prove the accrual system was used, it is strong proof that the completed contract method was not elected. It is completely incongruous to state that taxpayers elected to report income on the completed contract basis in 1942 when the contract was, as obvious to all concerned, not completed until 1943. There at no time seems to be any question in the minds of the taxpayers or their accountant that substantial completion of the contract would not suffice and that the fundamental feature of the completed contract method was that income was reported only when the contract was completed. The record clearly indicates that taxpayers did not consider the contract completed in 1942, yet chose to report the income on the contract in that year regardless of that fact.

In addition to the foregoing proof that taxpayers did not elect to report the income from the Delta contract on the completed contract basis, there is affirmative evidence to support the District Court's finding that the income from the contract was intentionally reported as accruing during 1942. John P. Daley, on January 26, 1943, filed a form with the United States Engineer Department in which he clearly indicated that the basis used in reporting the revenue from the Delta contract for income tax purposes was the *accrual* basis. The form clearly provided spaces to be checked for the completed contract basis, cash receipt basis and accrual basis and Mr. Daley certified that the joint venture was utilizing the accrual basis for tax purposes. (R. 80-83.) The

taxpayers' attempts to explain away this clear documentary expression of intent (R. 185-188) lack plausibility. The assertion that the contracting officer demanded that taxpayers close their books as of December 31, 1942, so that he could "get off and go to war" (Br. 14) appears a bit far-fetched; furthermore, the Army could perhaps dictate renegotiation procedures, but there was no forced relationship between the renegotiation provisions and the manner in which taxpayers elected to file their income tax return. There is nothing in the record to prove that the provisions of the particular Renegotiation Regulations relied upon by taxpayer (Br. 15), which were not in force in the tax years in question, were administratively in force in those years. Moreover, the Renegotiation Regulations did not *require* the use of the completed contract method. If such method was used for tax purposes, it was not required to be used for renegotiation purposes in all cases, as taxpayers seem to suggest. (Br. 15.) The Regulations provided that under ordinary circumstances a contractor would be renegotiated on the same basis as he used for federal income tax purposes, but provision was made for contractors to be able to request a change of basis. Sec. 1603.302, 32 Code of Federal Regulations c. XIV, pp. 2835, 2859 (1944 Supp.) (Appendix, *infra*). Even if taxpayers were forced by the Army to report on the accrual basis and even if it was disadvantageous to them to report on the completed contract basis because of renegotiation provisions (thus causing taxpayers to elect the accrual basis), such facts would

merely add weight to the position that the accrual method was elected. The alleged fact that Daley, not knowing what the accrual basis was, marked that space only to avoid marking "Completed Contract" is without support in the record and likewise implausible—one might ask why Daley did not mark the "Cash Receipts" space instead. (R. 82.) Taxpayers' remaining contentions with respect to this document (Br. 16) are likewise without merit. It is submitted that the contemporaneous expression of intent represented in the document filed on January 26, 1943, is strong evidence of taxpayers' election of the accrual method. Mr. Daley's subsequent effort, years later, to explain away this evidence is weak in and of itself and becomes more so in view of the fact that, as the District Court noted (R. 106), it has become advantageous *ex post facto* to shift the income from 1942, a year of gain, to 1943, a year of loss (in addition to obtaining certain advantages under Section 6 of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126). Finally, Mr. Daley wrote to Mr. Radtke, on December 31, 1942, specifically setting forth the fact that his share from the ventures to date was \$65,597.77 (R. 139-141); the drawing off of such an accurate profit figure, before the contract was complete, indicates profits were computed on the accrual basis.⁵

⁵Taxpayers also try to write off as immaterial the fact that they stated, on the Delta War Venture tax return, that such return was prepared on the accrual basis. (Br. 13.) This fact is certainly of some probative value; taxpayers could have specified some other method, if such were utilized, even though the form provided only "cash" and "accrual" spaces. The fact that they *subsequently* filed an amended return, which was admittedly on the completed con-

Taxpayers contend that the District Court disregarded the direct evidence of the accounting facts (Br. 7) and that the accounting evidence demonstrates why the method employed was not the accrual method (Br. 11). It is true that, in determining whether a taxpayer has elected to report income on the cash basis or accrual basis, examination of the books and records for day-to-day entries involving inventories and accrual items of receipts and disbursements, such as receivables and payables, provides strong evidence of which method was in fact elected. See *Aluminum Castings Co. v. Routzahn*, 282 U. S. 92, 99. But the difficulty encountered with respect to such an approach in a case in which the determination is to be made between accrual and completed contract methods is that the day-to-day entries are not necessarily controlling, although they are of some probative value, since they could be made on one basis (such as the accrual basis, as was admittedly done in this case) and yet be taken into profit and loss on another basis (the completed contract basis, as taxpayers herein contend). The facts surrounding the point of election, including those not necessarily part of the accounting records, are of great importance. As the District Court properly noted (R. 105),

tract basis, and marked the same space should not be given much weight, in view of the later, self-serving nature of such a fact. *Aluminum Castings Co. v. Routzahn*, 282 U. S. 92, 98, relied upon by taxpayers (Br. 14), involved a situation in which the taxpayer asserted that its declaration on its tax return should control. That case is clearly distinguishable from this one, in which taxpayers assert that their declaration should *not* be considered as even probative of their election of an accounting method.

the fundamental feature of the completed contract basis is that it is a practice of treating receipts from a contract as income as of a particular time, i.e., the completion date of the contract. As already fully discussed, it was obvious to both the accountant and the taxpayers that the contract was not completed and they both knew that until such fact existed they should not report the income from the contract. It is thus inconceivable that, in face of such an obvious fact, taxpayers reported the contract income in 1942 and yet elected the completed contract method. It is submitted that the alleged error committed with respect to utilization of the completed contract method (i.e., the reporting of the contract income before the contract was completed or even considered so by the taxpayers) is so striking and obvious as to lead to the conclusion that it did not occur at all, but is merely a hindsight effort to shift income from one period to another.

The accounting evidence set forth by taxpayers (Br. 11-12) does not prove that taxpayers were *not* on the accrual basis nor does it prove that they elected the completed contract method (the latter is, of course, the fact which taxpayers had the burden of establishing). The most that taxpayers can claim for this evidence is that it shows that they made certain errors with respect to the utilization of the accrual method. Taxpayers' opening entries, setting up the contract on the books as a receivable, and the similar entries with respect to the subsequent increases in the contract price (R. 223-224, 225-227) were all made on

the accrual basis, a fact which taxpayers' accountant confirmed (R. 216, 220, 224). The fact that taxpayers did not later adjust the entries so as to defer the amount of the retained percentage hold-back is merely an error in the determination of income on the accrual basis, as would be any failure to adjust such accounts for work not yet estimated and approved, in accordance with the contract. (R. 45.) See *Dally v. Commissioner*, 20 T.C. 894, affirmed, 227 F. 2d 724 (C. A. 9th), certiorari denied, 351 U. S. 908.⁶ Taxpayers also note (Br. 12) that certain costs were brought into the 1942 computation of income, though not technically incurred in that year. The record is not at all clear whether these costs were in fact not incurred until a later year;⁷ furthermore, this assertion is offset by the fact that several other costs, which were definitely established to have been incurred in 1943, were *not* related back to 1942. (R. 229-232.) Taxpayers' accountant admitted (R. 232) that the books did not

⁶Income from a fixed-fee contract (with provisions for partial payments based upon periodic approved estimates) is determined on the date of the estimate. *Dally v. Commissioner*, *supra*. Since taxpayers' refund claims and suit were based upon the theory that they were always on the completed contract basis, the record is not clear as to how much income had accrued. The record merely shows the "Amount of Contract Completed" and "Amount Paid on Voucher" (R. 79), but not the amount estimated and approved.

⁷The accountant's testimony (R. 220-221) with respect to the expenses is sketchy and qualified and, in fact, seems to indicate that although billings had not yet been received by taxpayers, the services and merchandise purchased had been received and an indebtedness was considered to have occurred. Once again, the record insofar as accrual of expenses is concerned, is insufficient, apparently because the sole issue was whether taxpayers were on the completed contract basis and the proper computation of income on the accrual basis was not in issue.

disclose that the contract was completed in 1942. These facts illustrate that the books were not kept or closed on the completed contract basis and, together with the other evidence of taxpayers' intent, clearly support the District Court's finding that taxpayers elected to report their income on the accrual basis.

The other evidence taxpayers present to prove that the completed contract method was employed (Br. 12-13) is of doubtful value. As noted by the District Court (R. 106) and already fully discussed, the testimony of the accountant was not credible. The fact that John P. Daley testified that no return was filed in 1943 for the Delta War Venture because the 1942 return showed the contract as completed proves no more than, as just discussed, that the accrual method was improperly applied. In fact, this testimony conflicts with the fact that certain items of contract expense were in fact incurred and reported in 1943. Finally, the facts that Daley Brothers had consistently employed the completed contract method, that jobs commenced in 1941 were closed in 1942, when completed, and that no new books were established for the joint venture with Mr. Radtke are immaterial. Apparently, taxpayers are attempting to renew the argument that they are required to consistently report on the same basis and require the Commissioner's consent to change accounting methods. Not having obtained such consent, taxpayers seek to infer that they were on the same basis as before. The District Court properly held (R. 103, 110-111) that Daley Brothers, Daley Bros., Ltd., and Daley Brothers' Delta War Venture

were each separate and distinct business entities.⁸ The Delta War Venture was filing its first return in 1942 and thus taxpayers were free to elect any method of accounting allowed by the statute and Regulations. Moreover, the provision that the Commissioner's consent is required before a change in accounting method can be made is clearly optional on the part of the Commissioner and his consent can be implied from his acceptance of a new method without objection or other indication of his non-acquiescence. *Fowler Bros. & Cox v. Commissioner*, 138 F. 2d 774 (C. A. 6th); *S. Rossin & Sons v. Commissioner*, 113 F. 2d 652 (C. A. 2d).

Taxpayers also argue that if they did *not* keep their accounts in connection with the Delta contract on the completed contract method, then the method they utilized was unacceptable, since it did not clearly

⁸Daley Bros., Ltd., was a new partnership formed on June 30, 1942, filing a certificate of doing business under that fictitious name on July 6, 1942 (R. 108), and the Delta War Venture was itself a new partnership, formed in July 1942, between the new limited partnership and Mr. Radtke (R. 19). The general partnership, limited partnership, Daley Brothers' Barracks Venture and the Delta War Venture all filed separate partnership returns in 1942 (R. 142, 144, 145, 146) and, as part of a protest filed by taxpayers with the Bureau of Internal Revenue November 15, 1944, John P. Daley stated the Delta War Venture operated as a separate partnership (R. 181, 183-184).

The fact that no new books were established does not alter the separate nature of the partnerships, as shown by the above facts. The jobs referred to as commencing in 1941 and being reported on the completed contract basis were commenced by the Daley Brothers general partnership and the \$131 involved was reported on the limited partnership return; another such item, totalling \$21,300, was reported on the general partnership return. (R. 174-177.) These two items, in which neither Radtke nor the Delta War Venture shared, show that these partnerships were separate and distinct from the Venture.

reflect income. (Br. 19-20.) They further assert that even if the method utilized was the accrual method, such method does not clearly reflect income in this case. (Br. 21-28.) Taxpayers then state that they should be allowed to compute income on the completed contract method since, they contend, that method is the only one which does clearly reflect income. Both arguments are essentially the same and the cases cited with respect to each are distinguishable from this case, either on their facts or the issues involved. Taxpayers' first argument improperly assumes that the method employed by them in the original Delta War Venture return for 1942 reports income that was not earned and they are entitled to adopt a different method. Taxpayers' second contention improperly assumes that the accrual method, properly applied, would still not clearly reflect income and only the completed contract basis would do so. The fact is that in cases involving a fixed-fee contract, with periodic partial payments as work progresses, taxpayers may elect either method; the accrual system, *if properly applied*, will clearly reflect the taxpayer's income. See *Dally v. Commissioner, supra*; I. T. 3459, 1941-1 Cum. Bull. 236 (Appendix, *infra*). Thus, if taxpayers had properly applied the accrual method, which they elected to employ, they would have adjusted their accounts by the amount of the retained percentage hold-back and by any amounts not yet estimated, approved and certified, and would have deducted the expenses for which they had incurred a definite liability. This would have resulted in the

proper reflection of income, under the accrual method, for the year 1942, whether the result be a profit or loss for that particular year. Taxpayers contend that the accrual method, properly applied, would result in a loss of \$266,471.71 for 1942 and net income of approximately \$472,722.15 in 1943. (Br. 24.) The propriety of these amounts cannot be ascertained, however, because the record is void of facts which would enable the accrued receipts, incurred expenses and net profit or loss to be computed on the accrual basis. The record merely shows the amount of the contract completed, \$3,353,828.39, and the amount paid on vouchers, \$3,180,536.97, as of December 1, 1942. (R. 79.) The amounts of certified estimates (which would fix the accrued income) are not disclosed; of particular significance would be the amount of such estimates existing as of December 1, 1942, and any additional estimates during that month. Information concerning the status of expenditures is also almost completely lacking. (See footnotes 6 and 7, *supra*.) The resulting profit or loss, computed on the accrual basis, would not be "fictitious," as taxpayers assert. (Br. 24.) It is basic that net profit for income tax purposes is computed on an annual basis and, if the accrual method is used, a profit (or loss) might result for a particular year, even though the overall result on a particular transaction might be the opposite. The accrual method merely relates the income and expenses as they apply to the respective accounting periods in which the right to receive, or the obligation to pay, has become final and definite, resulting in

a proper reflection of income for that period. *Security Mills Co. v. Commissioner*, 321 U. S. 281.

Taxpayers' final argument, i.e., that any election to report on the accrual basis was an innocent mistake, from which taxpayers should be relieved (Br. 28-30), is without merit on the facts of this case. As already fully discussed, there was no misapprehension or mistake on the part of taxpayers with respect to the law or their rights in being able to report the income from the Delta contract upon either the accrual basis or the completed contract basis. They elected to report the income on the accrual basis with full knowledge of their right to report on the other basis if they desired to do so and cannot, in a later year, change the basis utilized in their original return merely for the sake of deriving some reduction of the tax due. *Commissioner v. Saunders*, 131 F. 2d 571 (C.A. 5th). The assertion that taxpayers have so far been denied the right to compute their tax liability in a correct manner stems from the fact that taxpayers improperly included some income in their accrual computation, a fact of their own doing, and one which cannot be corrected in this action (as developed in Point II, *infra*).

II.

TAXPAYERS CANNOT, IN THIS ACTION, CORRECT THE DELTA WAR VENTURE'S ACCRUAL COMPUTATION, INASMUCH AS TAXPAYERS' CLAIMS FOR REFUND AND COMPLAINT WERE BASED UPON A DIFFERENT GROUND.

Taxpayers now claim, in the alternative, that, since they have been held to have reported the Delta War Venture income on the accrual basis in 1942, they should be permitted to correct the alleged errors in the accrual computation. (Br. 30-38.) The District Court, in finding that taxpayers elected to report all of the income on the accrual basis in 1942, further noted that a portion of the income actually accrued in 1943, but concluded that refunds based upon correction of this error could not be granted in this action, since the grounds stated in the refund claims and the complaint were solely that all of the receipts from the contract had been erroneously reported as income in 1942 as a result of a mistaken application of the completed contract method of accounting. (R. 106, 110, 111.)

It is well-settled that a taxpayer who brings suit after a claim for refund has been denied can rely for recovery only on grounds presented to or considered by the Commissioner. The purpose of this requirement is to give the Commissioner notice of the nature of the claim and afford an opportunity for administrative adjustment without suit. *French v. Smyth*, 110 F. Supp. 795 (N.D. Cal.), affirmed *sub nom.*, *French v. Berliner*, 218 F. 2d 351 (C.A. 9th); *Samara v. United States*, 129 F. 2d 594, 597 (C.A. 2d). As

stated in *Nemours Corp. v. United States*, 188 F. 2d 745, 750 (C.A. 3d):

A long-standing statutory provision with regard to tax refunds is that suits may be brought only after a claim for refund has been filed with the Commissioner in accordance with the law and Treasury Regulations.⁶ The Regulations governing refunds under the statute in question here provide that "The claim must set forth in detail * * * each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof." Treas. Regs. 94, Art. 322-3 (1936).⁷ It is to be noted that both the grounds for recovery and the facts supporting them must be shown. The taxpayer stated as its ground for refund Section 26(f) and made its computation accordingly. That does not, under the decisions, give him a right to claim under some other section. See especially *Real Estate-Land Title & Trust Co. United States*, 1940, 309 U. S. 13, 60 S. Ct. 371, 84 L. Ed. 542; *A. M. Campan Realty Co. v. United States*, Ct. Cl. 1947, 69 F. Supp. 133.

This is hard law, no doubt. Perhaps it is necessarily strict law in view of the scope of the operations of a fiscal system as large as that of the United States. Whether that is so we are not called upon to say. We apply the rule; we do not make it. It is to be observed that recovery of claims against the Government has always been

⁶Rev. Stat. § 3226, as amended in § 1103 (a) of the Revenue Act of 1932, 47 Stat. 286. See Internal Revenue Code, § 3772, 26 U.S.C.A. § 3772.

⁷The present Regulations are to the same effect. Treas. Regs. 111, Sec. 29.322-3.

the subject of a strict compliance requirement. The recovery of claims for tax refunds is but an application of this broad and strict rule.⁸

⁸See e. g. *Angelus Milling Co. v. Com'r*, 2 Cir., 1944, 144 F. 2d 469, 472, affirmed, 1945, 325 U.S. 293, 65 S.Ct. 1162, 89 L. Ed. 1619; *Maas & Waldstein Co. v. United States*, 1931, 283 U.S. 583, 589, 51 S.Ct. 606, 75 L. Ed. 1285; *Rock Island, Arkansas & L.R. Co. v. United States*, 1920, 254 U.S. 141, 143, 41 S.Ct. 55, 65 L. Ed. 188; *Nichols v. United States*, 1868, 7 Wall. 122, 126, 19 L. Ed. 125.

The facts clearly illustrate that taxpayers' claims for refund and action in the District Court were based upon the premise that taxpayers had elected to report the income of the Delta War Venture on the completed contract basis and, in fact, did so; taxpayers sought to prevail in their claims for refund because, they asserted, the completed contract method was misapplied, the contract income being reported in 1942, when the contract was not completed until 1943.

The amended claims for refund, by way of explanation of the precise nature of the claim, read as follows (R. 99):

The following reasons that this claim should be allowed are in accordance with the original claims which were timely filed:

The amended partnership returns were filed to correct the erroneous returns which were filed for years 1942 and 1943. The amended returns as filed are consistent with the accounting procedure used by Daley Brothers during the year 1943 and prior. The amended returns are to correct the Delta, Utah, contract which was completed in the year 1943 and erroneously included in income for

the year 1942. The claim reflects the correct tax liability in accordance with sec. 6 of the current tax payment act of 1943, Public #68—78th Congress. Included in the correction is the amount of renegotiation refund which was erroneously deducted from income in the original 1942 return.

The claims, standing by themselves, are somewhat vague and, without more, might have been subject to a motion to dismiss for lack of failing to state specific grounds upon which the refund was demanded. See *J. H. Williams & Co. v. United States*, 46 F. 2d 155 (E.D. N.Y.). Insofar as they are at all specific, they indicate that taxpayers are seeking a refund based on application of the completed contract method (the method which Daley Brothers used in prior years for other partnerships, as outside facts disclose). (R. 18.) The language that the amended returns are to correct the Delta contract "which was completed in the year 1943 and erroneously included in income for the year 1942" (R. 99) further implies that application of the completed contract method was intended.

Whatever question exists as to the specific nature of the claims is clarified by reference to the amended tax returns for the Delta War Venture. (R. 88-92.) These were attached to the claims and clearly indicate that the basis of the claims is that taxpayers seek refunds based upon a correct application of the completed contract method. Contrary to the taxpayers' assertions (Br. 33), the amended return for 1942 completely drops all gross receipts, cost of goods sold

and net income from that year (carrying forward all receipts and costs to the following year) and the amended return for 1943 reports all the receipts and costs of the Delta contract in that year. This is perfectly consistent with, and indicative of, the completed contract method. There is no effort to allocate receipts or costs between the two years, as would have been done if taxpayers based their claims on a correction of the accrual basis.⁹ Taxpayers virtually concede this point. (Br. 14, 36.) It is apparent that the claims are not sufficiently broad to encompass the contention that the accrual method was erroneously used in this case.

Similarly, as the District Court stated (R. 106), the complaint is based upon the allegations that taxpayers originally reported the income on the completed contract basis and, by mistake, considered the contract completed in 1942; it prays for relief which will shift all the income to 1943, the year in which the contract was in fact completed. Thus, taxpayers specifically alleged (R. 10-11):

The accountant for Daley Brothers, acting under the mistaken assumption that the monies received under the said contract was income for income tax purposes for the year 1942, prepared financial statements for income tax returns that included

⁹It is interesting to note that taxpayers now state that the amended and original returns were designated, on the returns, as being prepared on the accrual basis, seeking to infer that this is of probative value. (Br. 34.) This is directly contrary to their position with respect to this point insofar as it was discussed in the first issue. (Br. 13-14.)

the monies received in 1942 under said contract. *That said monies received under the contract for the Delta Venture was not income for any year until the said contract was completed as provided for in the contract, and accepted by the United States Government.* That said completion and acceptance was not made until February 16, 1943. (Emphasis supplied.)

The remaining allegations, set forth in paragraphs VIII, IX and X of the complaint (R. 11-12), clearly illustrate that the theory of taxpayers' cause before the District Court was as heretofore set forth. The relief requested (R. 12-13) is in conformity with the claims for refund and the amended returns, which were on the completed contract basis, as taxpayer admits (Br. 36). The complaints, therefore, in no way set forth, as an alternative, that taxpayers should be allowed a refund based upon the proper application of the accrual method.¹⁰

The conduct of the trial itself corroborates the fact that taxpayers based their claim upon the ground set forth by the District Court. There is nothing in the testimony of John P. Daley (R. 137-212) which indicates that taxpayers were endeavoring to prove that the Delta War Venture was on the accrual basis or

¹⁰Rule 54(c) of the Federal Rules of Civil Procedure, cited by taxpayers (Br. 36), should not be interpreted as to grant relief based upon grounds at variance with the claims for refund. The Rule specifically states that the judgment shall grant the relief *to which the party is entitled* and it is well-settled that, in tax refund suits, taxpayers may only recover upon the grounds presented in the claims.

that income was erroneously included in 1942 on the accrual basis. Affirmatively, the testimony of the accountant (R. 213-245) was an attempt to prove that the Delta War Venture reported the Delta contract income, in 1942, on the completed contract basis, and that this was an error resulting from his mistaken belief that the contract was completed in 1942, when it was not in fact completed until 1943. There is nothing to indicate any attempt to prove the Delta War Venture was on the accrual basis.¹¹ Similarly, taxpayers' position in their brief before the District Court (pp. 10-11) was that "The plaintiffs simply wish to have their 1943 income taxes computed on the basis that the income from the Delta Contract was earned in 1943, rather than in 1942" and (p. 28) "The plaintiffs, in their claims for refund, in the Complaint on file in this proceeding, and at the trial of this case, have taken the position that the completed contract method is the appropriate way to proceed. * * * It is the plaintiff's position that the law requires that the income for 1942 and 1943 be computed on a completed contract basis, and that is the only option which is open to correct the errors made."

Thus, the taxpayers' claim for refund, amended tax returns, complaint, evidence and District Court brief were based on the ground that *all* of the contract receipts had been erroneously reported as income in

¹¹As already fully discussed, the record does not present the material facts essential to a proper computation of income upon the accrual basis. (See footnotes 6 and 7, *supra*.)

1942 as a result of a mistaken application of the completed contract method, which taxpayers asserted had been elected and employed. They may not in this case seek any adjustment or correction of their accrual computation, which method they in fact utilized. If this forecloses consideration of this alternative claim, it is only because taxpayers failed to fulfill the conditions precedent to obtaining a determination on the merits. *Blum Folding Paper Box Co. v. Commissioner*, 4 T. C. 795, 801.

It might even be noted that, since the correction of the original accrual computation was not in issue, the District Court's opinion and conclusions with respect to this point are merely dictum and, in fact, the issue is raised for the first time on this appeal. Taxpayers cannot fairly urge as ground for reversal a theory which they did not present while the case was before the trial court. *Dally v. Commissioner, supra*.¹²

¹²A remand, as suggested by taxpayers (Br. 37-38), would serve no purpose in this case. The claims for refund could not be amended, inasmuch as the statute of limitations has run. Sec. 322(b), Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 322); *United States v. Garbutt Oil Co.*, 302 U.S. 528. Furthermore, there was no waiver of any defect in the claim; the claim, together with the amended returns, was specific enough and the Commissioner was entitled to take it at face value. The Commissioner was, and is, without power to consider any new grounds after the expiration of the period for filing claims. *United States v. Garbutt, supra*; *Cherokee Textile Mills v. Commissioner*, 5 T. C. 175, 178.

CONCLUSION.

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE,

Assistant Attorney General.

LEE A. JACKSON,

SHELDON I. FINK,

Attorneys, Department of Justice,

Washington 25, D. C.

LLOYD H. BURKE,

United States Attorney.

LYNN GILLARD,

Assistant United States Attorney.

December, 1956.

(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code of 1939:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

(26 U.S.C. 1952 ed., Sec. 41.)

SEC. 42 [as amended by Sec. 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 42.)

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 43.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.41-1. *Computation of Net Income*.—Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditure which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income,

it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See sections 29.42-1 to 29.42-3, inclusive.) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

* * * *

Sec. 29.41-2. *Bases of Computation and Changes in Accounting Methods.*—Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. See section 48 for definitions of “paid or accrued” and “paid or incurred.” All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. But see sections 42 and 43. See also section 48. For instance, in any case in which it is necessary to use an inventory, no method of accounting in regard to purchases and sales will correctly reflect income except an accrual method. A taxpayer is deemed to have received items of gross income which have been credited to or set apart for him without restriction. (See sections 29.42-2 and 29.42-3.) On the other hand, appreciation in value of property is not

even an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property. (But see section 29.22(c)-5.)

The true income, computed under the Internal Revenue Code and, if the taxpayer keeps books of account, in accordance with the method of accounting regularly employed in keeping such books (provided the method so used is properly applicable in determining the net income of the taxpayer for purposes of taxation), shall in all cases be entered in the return. If for any reason the basis of reporting income subject to tax is changed, the taxpayer shall attach to his return a separate statement setting forth for the taxable year and for the preceding year the classes of items differently treated under the two systems, specifying in particular all amounts duplicated or entirely omitted as the result of such change.

A taxpayer who changes the method of accounting employed in keeping his books shall, before computing his income upon such new method for purposes of taxation, secure the consent of the Commissioner. For the purposes of this section, a change in the method of accounting employed in keeping books means any change in the accounting treatment of items of income or deductions, such as a change from cash receipts and disbursements method to the accrual method, or vice versa; a change involving the basis of valuation employed in the computation of inventories (see sections 29.22(c)-1 to 29.22(c)-8, inclusive); a change from the cash or accrual method to the long-term contract method, or vice versa; a change in the long-term con-

tract method from the percentage of completion basis to the completed contract basis, or vice versa (see section 29.42-4); or a change involving the adoption of, or a change in the use of, any other specialized basis of computing net income such as the crop basis (see sections 29.22(a)-7 and 29.23(a)-11). Application for permission to change the method of accounting employed and the basis upon which the return is made shall be filed within 90 days after the beginning of the taxable year to be covered by the return. The application shall be accompanied by a statement specifying the classes of items differently treated under the two methods and specifying all amounts which would be duplicated or entirely omitted as a result of the proposed change. Permission to change the method of accounting will not be granted unless the taxpayer and the Commissioner agree to the terms and conditions under which the change will be effected. See section 22(d) and regulations thereunder with respect to changing to optional method of inventorying goods.

* * * *

Sec. 29.42-4. *Long-Term Contracts*.—Income from long-term contracts is taxable for the period in which the income is determined, such determination depending upon the nature and terms of the particular contract. As used in this section the term “long-term contracts” mean building, installation, or construction contracts covering a period in excess of one year from the date of execution of the contract to the date on which the contract is finally completed and accepted. Persons whose income is derived in whole or in part

from such contracts may, as to such income, prepare their returns upon either of the following bases:

(a) Gross income derived from such contracts may be reported upon the basis of percentage of completion. In such case there should accompany the return certificates of architects or engineers showing the percentage of completion during the taxable year of the entire work to be performed under the contract. There should be deducted from such gross income all expenditures made during the taxable year on account of the contract, account being taken of the material and supplies on hand at the beginning and end of the taxable period for use in connection with the work under the contract but not yet so applied.

(b) Gross income may be reported for the taxable year in which the contract is finally completed and accepted if the taxpayer elects as a consistent practice so to treat such income, provided such method clearly reflects the net income. If this method is adopted there should be deducted from gross income all expenditures during the life of the contract which are properly allocated thereto, taking into consideration any material and supplies charged to the work under the contract but remaining on hand at the time of completion.

A taxpayer may change his method of accounting to accord with paragraph (a) or (b) of this section only after permission is secured from the Commissioner as provided in section 29.41-2.

Sec. 29.43-1. "*Paid or Incurred*" and "*Paid or Accrued*."—

(a) The terms "paid or incurred" and "paid or accrued" will be constructed according to the method of accounting upon the basis of which the net income is computed by the taxpayer. (See section 48(c).) The deductions and credits provided for in chapter 1 (other than the dividends paid credit provided in section 27) must be taken for the taxable year in which "paid or accrued" or "paid or incurred," unless in order clearly to reflect the income such deductions or credits should be taken as of a different period. If a taxpayer desires to claim a deduction or a credit as of a period other than the period in which it was "paid or accrued" or "paid and incurred," he shall attach to his return a statement setting forth his request for consideration of the case by the Commissioner together with a complete statement of the facts upon which he relies. However, in his income tax return he shall take the deduction or credit only for the taxable period in which it was actually "paid or incurred," or "paid or accrued", as the case may be. Upon the audit of the return, the Commissioner will decide whether the case is within the exception provided by the Internal Revenue Code, and the taxpayer will be advised as to the period for which the deduction or credit is properly allowable.

* * * *

I.T. 3459, 1941-1 Cum. Bull. 236:

Advice is requested by the M Company relative to the proper method of reporting income from a certain type of Government contract for the purpose of Federal income taxation.

The taxpayer keeps its accounts and files its returns on the accrual basis and regularly reports its income from long-term contracts for the taxable year in which each such contract is completed. It believes, however, that the completed contract basis will not be satisfactory under the terms of the particular Government contract here under consideration.

The contract in question specifies an amount of estimated aggregate cost upon the basis of which a specified fixed fee for its profit is to be paid to the M Company, the contractor. It provides for semimonthly payments (or more frequently, if justified) as earned to cover costs of construction incurred by the contractor, plus an amount computed on such costs on account of the fixed fee. The payments on account of the fixed fee are to be continued until the total amount paid equals a designated figure. The remainder of the fixed fee, less a designated reserve, is to be paid upon preliminary acceptance of the article constructed, and such reserve is to be paid upon final acceptance. An increase of the fixed fee is provided for in event that the Government increases the cost, and a bonus is provided for accelerated delivery and for saving in cost, the sum of all bonuses not to exceed a designated amount. As payments of cost and fixed fee are made by the Government, all parts constructed and materials on account of which such payments have been made immediately become the sole property of the United States, but this provision is not construed as relieving the contractor from the responsibility for the care and protection of materials and work upon which

payments have been made or as a waiver of the right of the Government to require fulfillment of all the terms of the contract. The actual cost of correcting all defects and deficiencies for which the contractor is held responsible is to be deducted from the payment in final settlement.

Upon consideration of the terms of the contract in question, the Bureau is of the opinion that the income from the contract accrues in the taxable years in which the income is earned and the right of the taxpayer to payment therefor is fixed. Therefore, it is held, in order clearly to reflect the net income, that the gross income from the contract and from other contracts of this type, including the so-called reimbursements of cost, should be reported by the taxpayer (reporting on the accrual basis) in the returns for the taxable years in which the income accrues, and there should be allowed as deductions therefrom the costs or expenses which are properly allowable as deductions under the applicable income or excess profits tax law and which are related to such gross income. (See sections 41 and 43 of the Internal Revenue Code and sections 19.41-1 and 19.43-1 of Regulations 103.) In regard to the maintenance and the preservation of adequate accounting records, see sections 41 and 54 of the Internal Revenue Code and sections 19.41-3 and 19.54-1 of Regulations 103.

This ruling is without effect upon the taxpayer's present method of reporting the income from long term contracts which may be reported on the completed contract basis.

32 Code of Federal Regulations (1944 Supp.):

CHAPTER XIV—WAR CONTRACTS PRICE ADJUSTMENT BOARD

1603.302 *Differing accounting methods.* Should there be employed a method of computing profit in a renegotiation for any fiscal year which is different from that employed in renegotiation for the fiscal year immediately preceding, the Department conducting the renegotiation must make adequate provision in the agreement or otherwise so that renegotiable business will not escape renegotiation because of the change. The interest of the Government in connection with the year which is the subject of renegotiation and for future years must also be protected and generally no item of cost which has been allowed in a previous renegotiation should be allowed in any subsequent renegotiation. These principles apply to renegotiation conducted with respect to a fiscal year, to a period other than a fiscal year or on a contract-by-contract basis. Under ordinary circumstances a contractor will be renegotiated on the same basis as that used for the determination of his income for Federal income tax purposes and, where a contractor requests and is allowed to renegotiate on some other basis, he will be required to agree that future renegotiations will be conducted on the same basis unless the War Contracts Board approves a variation of this proceeding by reason of unusual circumstances in a particular case.

No. 15,181

In the

United States Court of Appeals

For the Ninth Circuit

JOHN P. DALEY, MINERVA B. DALEY, MORRIS
DALEY, ZELMA B. DALEY, WILLIAM RAD-
TKE, CLARA RADTKE and HOMER BOSSE,
Trustee of the Estates of Morris K. Daley,
Alice M. Daley, Susan R. Daley, James D.
Daley, Kathryn F. Daley and Peter D. Daley,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Closing Brief

See Supplemental on back cover

ERIC SUTCLIFFE

WILLIAM D. MCKEE

ORRICK, DAHLQUIST, HERRINGTON
& SUTCLIFFE

405 Montgomery Street
San Francisco 4, California

Attorneys for Appellants

FILED

FEB - 1 1957

PAUL P. O'BRIEN, CLERK

SUBJECT INDEX

	Page
I. Introduction	1
II. Argument	2
1. Appellants Used the Completed Contract Method.....	2
2. Even if the Books of Account Were Not Kept on the Completed Contract Method, Appellants Are Entitled to a Refund on That Basis.....	9
3. If the Delta War Venture Adopted the Accrual Method, It Is Entitled to Apply That Method Correctly.....	16
Conclusion	20
Appendix	

TABLE OF AUTHORITIES CITED

CASES	Pages
Aluminum Castings Co. v. Routzahn (1930), 282 U.S. 92.....	7, 8
Badgley, Alfred H., v. Comm'r (1931), 21 B.T.A. 1055.....	4
Bent, H. S., v. Comm'r (9th Cir., 1932), 56 F.2d 99.....	4, 12
Bent, R. G., Co. v. Comm'r (1932), 26 B.T.A. 1369.....	4
E. E. Black Ltd. v. Alsup, 211 F.2d 879 (9th Cir., 1954).....	2, 9, 10
Comm'r v. Wells (6th Cir., 1942) 132 F.2d 405.....	19
Dally v. Comm'r (1953), 20 T.C. 894.....	10, 11, 12, 13, 14
Denman v. Squire (6th Cir., 1940), 111 F.2d 921.....	7
Ehret-Day v. Comm'r (1943), 2 T.C. 25.....	10
Finn, Russell G., et al. v. Comm'r (1931), 22 B.T.A. 799.....	4
Harrington, In re, 1 F.2d 749.....	2
Howbert v. Penrose, 38 F.2d 577 at 581.....	19
Keiser v. Walsh (1941), 118 F.2d 13.....	18
Layton, L. O., v. Comm'r (1952), 11 T.C.M. 1115.....	11
National Contracting Co. v. Comm'r, 37 B.T.A. 689, 702, aff'd (8th Cir.), 105 F.2d 488.....	2, 6
Nester v. Western Union Teleg. Co. (D.C. Cal, 1938), 25 F. Supp. 478	18
Niles Bement Pond Co. v. U.S., 281 U.S. 357.....	3, 8
Spring City Foundry Company v. Comm'r (1934), 292 U.S. 182, 54 S. Ct. 644.....	5
Underwood v. Comm'r (4th Cir., 1932), 56 F.2d 67.....	19
U.S. v. Harmon (1953), 205 F.2d 919.....	10, 11

STATUTES AND RULES

Federal Rules of Civil Procedure, Rule 54(c).....	18
Internal Revenue Code, Section 41.....	2

OTHER AUTHORITIES

Pages

Accounting Research Bulletin, Number 43, Chapter 11, Section A....	12, 14
Accounting Research Bulletin, Number 45: Long-Term Construction-type Contracts	7, 12, 14, Appendix
Herwitz, "Accounting for Long-Term Construction Contracts: A Lawyer's Approach," 70 Harvard Law Review 449 (January, 1957)	12, 13
The Journal of Accountancy, "Construction-type Contracts," December, 1955 (p. 53).....	12, 15

15,181

In the
United States Court of Appeals
For the Ninth Circuit

JOHN P. DALEY, MINERVA B. DALEY, MORRIS
DALEY, ZELMA B. DALEY, WILLIAM RAD-
TKE, CLARA RADTKE and HOMER BOSSE,
Trustee of the Estates of Morris K. Daley,
Alice M. Daley, Susan R. Daley, James D.
Daley, Kathryn F. Daley and Peter D. Daley,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Closing Brief

I.

INTRODUCTION

The taxpayers made at least one extremely serious error in their 1942 Income tax returns. It has been argued by the taxpayers, found by the District Court, and at last conceded by the United States (Br. 11, 12, 13, 26, 29, 31), that approximately \$473,000.00 was erroneously included in income for that year. The question presented is whether the taxpayers are going to be deprived of a refund of the income taxes overpaid as a result of their erroneous returns.

ARGUMENT**1. Appellants Used the Completed Contract Method.**

The Brief for the Appellee states that the question of whether taxpayers adopted the completed contract method for reporting income from the Delta contract "is purely factual and the findings of the District Court in that respect should not be disturbed unless clearly erroneous" (Br. 15).

But the Court below *did not treat* this issue as factual. The Court's determination of this issue is in paragraph III of its "Conclusions of Law", and not in its "Findings of Fact". It is clear from a reading of the Court's opinion and of the entire record that the Court below found, *as a matter of law*, that if a taxpayer reports income from a contract before it is completed, he has not elected the completed contract method. In this the District Court was in error. *E. E. Black Ltd. v. Alsop*, 211 F.2d 879 (9th Cir., 1954) and the other cases cited in our Opening Brief clearly demonstrate that the reporting of income when the contract is fully completed is only one of the aspects of the completed contract method, and that the fundamental and distinguishing feature of that method is reporting all income and deductions from the contract in the same year.¹

To be sure, the District Court should have treated the issue as a factual issue, and should have determined the issue from the evidence of the manner in which the books are kept. Int. Rev. Code § 41 ("The net income shall be computed in accordance with the method of accounting regularly employed in *keeping the books* of such taxpayer.")

1. In addition to the cases cited on page 17 of Appellants' Opening Brief, see *National Contracting Co. v. Comm'r*, 37 B.T.A. 689, 702, aff'd (8th Cir.), 105 F.2d 488, and *In re Harrington*, 1 F.2d 749. Note also that the Brief for the Appellee cites no cases and makes no argument to the effect that this is not the fundamental feature of the completed contract method.

However, despite the extensive evidence which was submitted with respect to the manner of keeping the books, *not one word is found*, either in the Court's opinion or in its Findings of Fact, relative thereto. In this, it is submitted, the Court clearly erred. And if the issue had been treated as a factual issue, a finding that the accrual method of reporting income was adopted rather than the completed contract method, would have been clearly erroneous.

The most important aspect of the accounts in determining the method of accounting adopted is the "principal and dominant purpose and plan" of the accounts. *Niles Bement Pond Co. v. U.S.*, 281 U.S. 357, 360, cited by Appellee (Br. 15). Thus, in that case, the Supreme Court stated: "The Court of Claims found that *the books of the petitioner* were kept on the accrual basis; that, while there were some exceptions * * * 'the principal and dominant purpose and plan of its accounts were to show income upon an accrual basis as the general and controlling character of the account' ". (Italics added.) Just as in the *Niles Bement Pond* case the "principal and dominant purpose and plan" of the taxpayers' accounts were to show income upon an accrual basis, so, in this case, the principal and dominant purpose and plan of the accounts and of the tax return were to show the profit from a completed contract. The clear and unequivocal testimony was that the full contract price was entered on the books when the contract was entered into, and not at any later time when the right to partial payments under the contract became fixed, and thus accrued. (Tr. 223-225). Does this sound as though the "principal and dominant purpose and plan of its accounts were to show income upon *an accrual basis*"? Obviously not. This practice is appropriate only if the taxpayer waits to close out the books of account until all costs are incurred and entered on the books of account and the contract is completed. The evidence as to the manner in which the accounts were closed out was also consistent *only* with the completed contract method of accounting (Op. Br. 11).

Appellee has pointed out that since the primary recording of financial data may be done on an accrual basis, but profit and loss may still be determined on a completed contract basis, it is helpful to look to "the facts surrounding the point of election" to determine whether the completed contract method was elected (Br. 18). Appellee's point would be well taken if the manner in which the taxpayers' books were kept were consistent with anything other than the completed contract method of reporting income. Since the statute itself requires that the tax returns be prepared "in accordance with the method of accounting regularly employed in keeping the books", the surrounding circumstances can have only secondary significance.²

The fact "surrounding" the election which Appellee finds of greatest significance is that the Appellants knew that the contract was not completed before the end of 1942. This, it is urged, is conclusive that the completed contract method was not utilized. But on the same basis of reasoning Appellants can argue that the fact that \$472,722.15 which *had not* accrued was put into the 1942 return is conclusive evidence that the accrual method was not adopted. Moreover, Appellants submit that if all of the surrounding facts are examined, and not only the isolated fact cited by Appellee, those facts provide strong support that the method of accounting used by Appellants was the completed contract method. Mr. Daley testified as to the reason why the Delta contract profit was estimated as of the end of 1942 even though he knew it was only 99% completed at that time. It was because the renegotiation officer wanted the profit from the contract estimated so that it could be renegotiated with other contracts completed in 1942. Mr

2. The following cases hold that if the books are kept on the completed contract method, the taxpayer is not entitled to elect any other method: *H. S. Bent v. Comm'r* (9th Cir., 1932), 56 F.2d 99; *Alfred H. Badgley v. Comm'r* (1931), 21 B.T.A. 1055; *Russell G. Finn, et al. v. Comm'r* (1931), 22 B.T.A. 799; *R. G. Bent Co. v. Comm'r* (1932), 26 B.T.A. 1369.

Daley thought that if he closed out the books on the contract for renegotiation purposes he had to do the same thing for tax purposes (Tr. 186-189).

Appellee has made a number of cynical remarks concerning this testimony of Mr. Daley's. It is stated that Mr. Daley's explanation lacked "plausibility", and that the assertion that the renegotiation officer wanted the profit from the contract estimated so that he could renegotiate the contract and "get off and go to war" appears "far-fetched" (Br. 22). Whether Mr. Daley's testimony lacked plausibility and was far-fetched is perhaps best left to this Court to be judged by the war-time recollections of its members. However, if Appellee means to question Mr. Daley's good faith, it is suggested that his testimony with respect to this matter be read. His testimony appears on pages 186-189 of the Transcript of Record, and even in cold print its sincerity is palpable. In addition, of course, there has not been the faintest hint as to any other reason why the results from the Delta contract would have been estimated at the end of 1942 instead of waiting until it was completed in accordance with the practice which had consistently been followed by the taxpayers since 1921 and thereafter until the time of the trial (Tr. 189-190).

These surrounding facts not only support Appellants' contention that the 1942 income tax return was prepared upon what was basically the completed contract method, they also show that it was *not* the intention to report income on the accrual method. The accrual method imports that you report income when the right to the income has matured. *Spring City Foundry Company v. Comm'r* (1934), 292 U.S. 182, 54 S. Ct. 644. Mr. Daley testified that he knew the income from the contract reported in the 1942 return had *not* matured and the profit shown on the return was only the "anticipated" profit (Tr. 146, 166, 167, 172). Mr. Gillard, representing the Appellee, made the same point at the trial of this

case when he agreed that the 1942 return reflected anticipated rather than matured revenues and costs. He said:

"That joint venture filed a return on the accrual basis at the end of 1942 accruing the total *anticipated* revenue from the contract, accruing the total *anticipated* costs from the contract, computing the net profit, at that time of \$206,000, and distributing the same in accordance with the agreements to the four people interested therein." (Tr. 127)

Appellee has attempted to explain away a portion of the other evidence that the completed contract method was adopted. To counter the evidence that certain costs were brought into the 1942 computation of income, though not technically accrued, Appellee points out that other costs incurred in 1943 were not related back to 1942 (Br. 26). Of course, the evidence was that the renegotiation data was submitted in January, 1943. Exhibit No. 16 (Tr. 80), Exhibit No. 17 (Tr. 83). Since the books were also closed out in January, it is obvious that the entries to which Appellee now refers were made after the books were closed out (Tr. 231). Moreover, on the completed contract method of accounting, costs which are clearly not incurred until the year after completion must be deferred, despite the fact that, by so doing, "the purpose of the completed contract method, namely, to account for the entire results of a contract at one time, is defeated." *National Contracting Co. v. Comm'r*, 37 B.T.A. 689, 702, aff'd (8th Cir.) 105 F.(2d) 488. This evidence is thus wholly consistent with the completed contract method of accounting.

In reply to the testimony of the accountant who closed the books and prepared the return that the completed contract method was used (Tr. 217, 239), Appellee states that the Court found that his testimony was not credible (Br. 27). Of course, the only testimony of the accountant which the Court doubted was that the accountant believed that the contract was completed (Tr. 106). Although this conclusion of the District Court is not relevant to the issues

in this appeal, we do point out that there was only a slight amount of work which was still necessary to be done at the end of 1942 (Tr. 149, 231). And for accounting purposes (as distinct from tax purposes) a contract may be reported as completed "if remaining costs are not significant in amount". (Accounting Research Bulletin No. 45, Para. 9, Appendix page 3, *infra*). It seems evident, therefore, that the accountant was not testifying that he thought the contract had been accepted, but only that it was completed in the sense that for accounting purposes it was not inappropriate to treat the contract as completed (Tr. 219, 231). In any event, if Appellee had any basis upon which to dispute that the books were kept on the completed contract method, the evidence should have been submitted at the trial. The record shows that Appellee had present in court an expert witness who had examined the taxpayers' books (Tr. 244). The implication from Appellee's failure to have this witness testify is that no contrary evidence could have been adduced.

Let us now look to what is relied upon by Appellee to sustain the finding that the *accrual* method of accounting was adopted. That finding was also essential to the Court's decision below (Op. Br. 18-19). The whole of the evidence cited by Appellee in support of the lower Court's finding is based on two "X" marks and one letter from Mr. Daley to Mr. Radtke (Br. 21-23). The "X" mark on the renegotiation form has already been discussed (Op. Br. 14-16). It might additionally be noted, however, that this form was prepared two months before the tax return was required to be filed (Tr. 80). It thus is no evidence as to how the return was later prepared. Appellee has relegated the "X" mark on the tax return to a footnote (Br. 23) in which the Supreme Court case of *Aluminum Castings Co. v. Rutzahn* (1930), 282 U.S. 92, is distinguished on the ground that there the taxpayer asserted that its declaration on its tax return should control. But Appellee has overlooked *Denman v. Squire* (6th Cir., 1940), 111 F.2d 921,

holding that the rule of the *Aluminum Castings Co.* case is also applicable when, as here, the government asserts that the declaration on the tax return should control.

The letter from Mr. Daley to Mr. Radtke which is relied upon by Appellee to show that profits were computed on the accrual basis in fact shows just the opposite. The fact that Mr. Radtke's share from the joint ventures was computed to two decimal places means nothing. The 1942 tax return also showed profits computed to two decimal places, though profits were only estimated. But of great significance is the first sentence of the second paragraph of this letter (Tr. 140). This reads as follows:

"Our business arrangement has been a joint adventure, *and we are figuring it as though we were winding it up on this date.*" (Italics added.)

This letter is dated December 31, 1942. It is clear contemporaneous evidence that for accounting purposes the parties treated the Delta contract as if it were completed on that date.

The foregoing is the only evidence which is cited to support a finding of fact (if it had been made) that the taxpayers had elected the accrual method of accounting. No effort is made by Appellee to show from the evidence relating to the books of account that the accrual method of accounting was adopted for the purpose of reporting income, despite the fact that the cases hold that this is where that evidence *must* be found, if it exists. *Aluminum Castings Co. v. Routzahn*, 282 U.S. 92; *Niles Bement Pond Co. v. United States*, 281 U.S. 357.

The opinion and findings of the Court below also show no evidence from which it could be concluded that the accrual method of accounting was adopted. In the Court's opinion (Tr. 106) the following reasoning is disclosed:

"It is clear that all of the income from the Delta contract was intentionally reported as accruing during the year 1942, and that the accrual method of accounting for such income was thereby adopted. It is not inappropriate to comment that the

taxpayers' financial status at the close of 1943 made it advantageous ex post facto to report the Delta income in 1943. It does appear that some of the Delta contract income in fact did not accrue until 1943 and was improperly included in the 1942 return. To this extent the 1942 return was erroneous."

While it seems somewhat startling, it appears from the first sentence that the Court reasoned that because the taxpayers included income which had *not* accrued, they thereby adopted the accrual method of accounting! See also Findings of Fact VII (Tr. 110). Perhaps the second sentence is somewhat more significant in seeking out the basic reason why the trial judge found for the Defendant. (See also the comment of the trial judge at the close of the trial, commencing at the bottom of page 247 of the Record.) It is, of course, a truism to say that refund claims are filed only when it is advantageous to the taxpayer to do so. The cases are numerous which hold that if a taxpayer has made an accounting error resulting in an overpayment of tax, he is entitled to a refund. See our Opening Brief, pp. 21-28.

It is respectfully submitted that the whole of the evidence reveals that the sum and substance of what the District Court did was to avoid following the decision of this Court in *E. E. Black Ltd. v. Alsop, supra* by characterizing the completed contract method of accounting as the "accrual method."

2. Even if the Books of Account Were Not Kept on the Completed Contract Method, Appellants Are Entitled to a Refund on That Basis.

Appellants have argued that even if the accounting method employed was not the completed contract method, they nevertheless are entitled to a refund computed by determining the income of the taxpayers for 1942 and 1943 by use of the completed contract method (Op. Br. 21-30). This is for the reason that the completed contract method is the only method which would "clearly reflect the income" from the Delta contract.

Appellee says that taxpayers argument in this respect "improperly assumes that the method employed by them in the original Delta War Venture return for 1942 reports income that was not earned" (Br. 29). It appears that this statement may be intended to present just one last time the unsupportable position that the original Delta War Venture return for 1942 was not erroneous. This is the position which the Internal Revenue Service and the Attorney General have maintained at all stages of this dispute up to and including their brief in the trial court. For example, in the original Revenue Agent's report on the claims for refund, dated January 30, 1951, the following conclusion is reached:

"the contractor, on an accrual basis, would be required to accrue income on the contract in accordance with the percentage completed."

In a letter dated July 26, 1951 from the Conferee Revenue Agent to the taxpayers' representative after a hearing within the Internal Revenue Service, the following conclusion is stated:

"On the accrual basis it appears that substantially all of the income from the contract in question was earned in 1942."

In a letter dated January 17, 1952 from the Chief, Appellate Staff of the Internal Revenue Service, informing Appellants that the refund claims would be disallowed, the following is stated as the basis for the proposed action:

"the percentage of completion was practically one hundred per cent by the end of 1942, hence the profit was earned in 1942."^{2a}

2a. It should be noted that in effect this is a concession that the completed contract method was used by the taxpayers. At the time this was written *E. E. Black Ltd. v. Alsup* (*supra*) had not been decided by this Court. Neither had the case of *Dally v. Comm'r* (1953), 20 T.C. 894, nor *U.S. v. Harmon* (1953), 205 F.2d 919. Accordingly, the law appeared to be that on the completed contract method of accounting substantial completion was all that was required. *Ehret-Day v. Comm'r* (1943), 2 T.C. 25.

This point of view was, of course, rejected by the Court below (Tr. 106), and Appellee elsewhere in its brief (Br. 11, 12, 13, 26, 29, 31) has conceded the point. See *Dally v. Comm'r* (1953), 20 T.C. 894, affirmed, 227 F.2d 724, certiori denied, 351 U.S. 908; *U. S. v. Harmon* (10th Cir., 1953), 205 F.2d 919; *L. O. Layton v. Comm'r* (1952), 11 T.C.M. 1115. See also the cases cited on page 19 of our opening brief. Appellee has not attempted to challenge or distinguish these cases from which it can only be concluded that the 1942 returns erroneously reported \$472,722.15 of income from the Delta contract.

If the District Court was correct that, despite the erroneous inclusion of \$472,722.15, taxpayers nevertheless reported their 1942 income on the accrual method of accounting, then the District Court should have examined whether that method, correctly applied, would "clearly reflect the income." Internal Revenue Code Sec. 41. Appellants have shown that the accrual method correctly applied would result in a very large loss for 1942 and an even larger profit for 1943. Thus the accrual method manifestly would not reflect the income earned in those years (Op. Br. 24).³

Notwithstanding the ridiculous results which would follow from the use of strict accrual accounting in connection with the Delta contract, Appellee argues that it is nevertheless proper in this case. Appellee has stated that "in cases involving a *fixed-fee contract*, with periodic partial payments as work progresses, taxpayers may elect either method; the accrual system, if properly applied, will clearly reflect the taxpayer's income." (*Italics added.*) (Br. 29) For this proposition, Appellee cites I.T. 3459 and the *Dally* case.

3. In a footnote (Br. 26), Appellee has challenged the sufficiency of Exhibit 15 to the Stipulation of Facts (Tr. 79) to prove the amount of the erroneous inclusion in 1942. Appellee stipulated to this summary after being supplied with all of the Contracting Officer's estimates and certificates of approval. Moreover, both Appellants and Appellee relied upon this Exhibit in their briefs below, and the District Court found the improper accrual on the basis of this Exhibit. Accordingly, Appellee's point is without merit.

The Appellee has failed to note, however, that the Delta contract was *not* a fixed-fee contract. It was a *lump-sum* contract (Tr. 25, 26). The distinction for accounting and tax purposes between fixed-fee contracts, in which the contractor gets a fixed fee for his profit regardless of costs, and lump-sum contracts, in which the contractor in effect sells the completed product for a set price, is well recognized in both the accounting⁴ and legal authorities.⁵ If the contractor under a fixed-fee contract is entitled to 50%, 75% or 99% of his fee, certainly the portion of the fee which has accrued will reflect his income. This is the type of contract to which I.T. 3459, which is found in the Appendix to Appellee's Brief, relates.

The *Dally* case, on the other hand, involved neither a fixed-fee, nor a lump-sum contract. That case involved a "unit price" contract. The contract there called for the manufacture and delivery of 1,000 pre-fabricated housing units *at a specified price per unit*. 20 T.C. 894 at 895. A unit price contract for 1,000 units is little more than 1000 separate contracts, the profit from each of which can be determined as the unit is delivered.⁶ It should be noted,

4. See Accounting Research Bulletin Number 45: Long-Term Construction-type Contracts (Appendix, *infra*). Paragraph 1 of that Bulletin states that it does not deal with "cost-plus-fixed-fee contracts" or for products "billed as shipped" (unit-price contracts). The Bulletin is thus restricted to "lump-sum" construction contracts of the Delta type. As to fixed fee construction contracts see Accounting Research Bulletin Number 43, Chapter 11, Sec. A. See also "Construction-Type Contracts," The Journal of Accountancy, December, 1955 (p. 53).

5. See Herwitz "Accounting for Long-Term Construction Contracts: A Lawyer's Approach" 70 Harvard Law Review 449 (January, 1957). See also *H. S. Bent v. Comm'r* (9th Cir., 1932), 56 F.2d 99 at 102, quoted in footnote 6, immediately below.

6. This Court recognized that the accrual basis may be appropriate to unit price contracts and fixed-fee contracts but not to lump-sum contracts in *H. S. Bent v. Comm'r* (9th Cir., 1932), 56 F.2d 99 at 102, where the Court said:

"[T]here is a more definite basis of ascertaining the amount of profit earned in the case of unit price contracts or income upon a contract on the basis of cost plus a fixed fee than there is on a lump sum contract where payments reflect only a portion of the amount earned."

moreover, that no issue was raised in the *Dally* case as to whether the accrual method clearly reflected the income from that contract.

As a matter of fact, the Treasury Department's own ruling (I.T. 3459) which is relied upon by Appellee, supports the position that the accrual basis will *not* clearly reflect income from a lump sum contract.

This Ruling (Appendix to Brief for Appellee) starts off by saying that the taxpayer regularly reports its income from construction contracts on the completed contract basis, but that it believes that method would not be satisfactory for the "particular Government contract here under consideration." The ruling then sets forth, in clear and unmistakable language, that the contractor is to receive "a specified fixed fee *for its profit*" and the ruling concludes that "*upon consideration of the terms of the contract* in question, the Bureau is of the opinion that the income from the contract accrues in the taxable years in which * * * the right of the taxpayer to payment therefor is fixed." And then, at the very end of the ruling is the significant notation that the ruling does not affect the taxpayer's practice of reporting income from other types of construction contracts on the completed contract method.

On the basis of any fair reading of this ruling, it is clearly applicable only where the contractor is entitled to a fixed fee for his profit, and is expressly made *inapplicable* to other types of construction contracts. Moreover, the ruling states that in the case of fixed-fee contracts only, the Bureau is of the opinion that "the income accrues" when the "right of the taxpayer to payment therefor is fixed." The clear implication is that the Bureau believes that income from a contract of the Delta type should not be regarded as accruing before the contract is completed.⁷

7. An excellent exposition of this position is found in Herwitz, "Accounting for Long-Term Construction Contracts: A Lawyer's Approach," 70 Harvard Law Review 449 (January, 1957), at 455-458.

Further support that the strict application of the accrual system to construction contracts will not be regarded as capable of "clearly reflecting the income" is the Government's own Regulation relating to the completed contract method. This Regulation is quoted beginning on page v of the Appendix to Appellee's Brief. It starts out by saying:

"Income from long-term contracts is taxable for the period in which the income is *determined* [not "accrued"], such determination depending upon the nature and terms of the particular contract." (*Italics and bracketed words added.*)

The Regulation then goes on to say that persons whose income is derived from such contracts may prepare their returns upon "either" the percentage of completion or the completed contract method. There is no indication that the Treasury Department considers that a strict application of the accrual system is ever a proper way to "determine" the income from a contract of this type.⁸

By citing only the *Dally* case (in which a "unit price" contract was involved and in which the issue wasn't raised anyhow) and I.T. 3459 (which involves a fixed-fee contract) the Appellee reveals a basic fault in this part of its argument. The truth appears to be that there is no case holding that a strict accrual method is permissible in connection with a lump-sum construction contract, and there is substantial authority to the contrary.⁹

8. See also Accounting Research Bulletin No. 45, paragraph 2 (Appendix, *infra*): "2. Considerations other than those acceptable as a basis for the recognition of income frequently enter into the determination of the timing and amounts of billings on construction-type contracts. For this reason, income to be recognized on such contracts at the various stages of performance ordinarily *should not be measured by interim billings*" [the accrual method]. (*Italics added.*) Compare this with paragraph 2 of the Bulletin on Fixed-Fee contracts (ARB 43, Chapt. 11A): "The fees may also be accrued as they are billable * * *"

9. In addition to the authorities cited in footnotes 4-8 and in the text, see also "Construction-Type Contracts," by the Research Department,

Despite these persuasive authorities, Appellants' case does not depend on the argument that the strict accrual method may never be used to report income from a lump sum construction contract, or that the completed contract method is really only the accrual method as applied to lump sum contracts. On pages 24-27 of their Opening Brief, Appellants have cited and fully discussed a total of 8 different cases holding that what might generally be an acceptable accounting method will be unacceptable if it does not clearly reflect income *in a particular case*. Appellants have also clearly set forth the misleading results which would follow from a strict application of the accrual method in this particular case. The Appellee has stated only that the cases discussed by Appellants "are distinguishable from this case, either on their facts or the issues involved" (Br. 29). The only case cited by Appellee is the *Security Flour Mills Co.* case (Br. 31). In that case the taxpayer attempted to deduct a single item of contested taxes in a year *prior* to the year in which liability had been established, and thus *before* the deduction accrued. The Court properly held that there was nothing in the statute which authorized a deduction prior to the time liability therefor was incurred. While that case is further au-

American Institute of Accountants, Journal of Accountancy, December, 1955 at page 53:

"This discussion will be confined to the type of contract where the contractor does not work on a fee basis, but rather agrees to a contract price which may give him either a gain or a loss upon the completion of the contract. * * *

"It is sometimes suggested that the billings which have been made to a customer constitute a possible basis for the recognition of realized income on a partially completed contract. In some cases the customer permits early interim billings which are excessive in relation to the work performed, in order to provide working capital for the contractor. In other cases, interim billings may be kept below the costs incurred in order to protect the owner, although this is generally accomplished by retainage rather than deferment of billings. *Billings, therefore, except by coincidence, are not a suitable basis for profit allocation.*" (Italics added.)

thority that the original 1942 Delta Venture return was erroneous, it is not authority that the completed contract method should not be used when that is the only method which clearly reflects the income.

It follows, accordingly, that since the accrual method would not clearly reflect income from the Delta contract, Appellants are entitled to correct the errors in the 1942 return by correctly applying the completed contract method.

3. If the Delta War Venture Adopted the Accrual Method, It Is Entitled to Apply That Method Correctly.

In the previous pages of this brief, Appellants have set forth the reasons why the original 1942 Delta Venture return should have shown no receipts and no deductions. The Court below, however, apparently found that the 1942 return was erroneous "only" to the extent of \$472,722.15. Despite the fact that Appellants proved at least this portion of the full error claimed,¹⁰ the Court below held that Appellants could not recover. If this is the law, then it certainly is not good or just law.

But even apart from the basic injustice of the Court's decision below, Appellants have shown in their Opening Brief that they have complied with the most technical and stringent interpretation of the requirement that the claim for refund set forth the grounds upon which the refund is claimed.

Appellants noted in detail (Op. Br. 32-34) that the amended returns filed with the refund claims reduced the gross receipts reported as having accrued for 1942 by the amount of \$472,722.15,

10. Note again the authority that the completed contract method is only a specific application of the accrual method of accounting. See Footnote 7, *supra*, page 13 and the authorities cited therein. Appellants attempted to prove that all of the receipts should not have been accrued, but succeeded only in convincing the Court that a portion of the receipts should not have been accrued. Accordingly, the error proved was embraced within the larger error claimed.

and claimed that such receipts were advances only. This is clearly a claim that the original return was in error to the extent of \$472,722.15, as well as to the extent of the full amount. Appellee has not addressed its brief to the point made by Appellants. Instead, Appellee (bottom pg. 35, top pg. 36) has, in effect, stated that by asserting the right to correct the error by use of the completed contract method, Appellants have somehow waived the right to correct the error by any other method.

Appellee sets forth on page 34 and elsewhere in its brief the position that the claims for refund "were based upon the premise that taxpayers had elected to report the income of the Delta War Venture on the completed contract basis." Appellee does not explain how it can take this position after its own counsel at the trial analyzed the language of the claims and told the Court that the essence of the claims was that the Appellants "made a mistake in filing them [the returns] on the accrual basis" (Tr. 136).

Appellee has not disputed that on the administrative level taxpayers took the alternative position that if they adopted the accrual method then there was still a substantial over-accrual of income. See Op. Br. 37. Appellee has also conceded in its brief that such administrative consideration is all that is necessary.¹¹ And as Appellants have previously demonstrated (page 10, *supra*), the Bureau of Internal Revenue was given the opportunity *on three different levels* to adjust this matter by recognizing the taxpayers' claim that even on the accrual method an error had been made, but on each of the three administrative levels the taxpayers' just and meritorious position was erroneously rejected.

Appellee has stated that Appellants did not raise the question of whether income was improperly reported on the accrual method

11. Br. 32: "It is well settled that a taxpayer who brings suit after a claim for refund has been denied can rely for recovery only on grounds presented to *or considered by* the Commissioner." See cases cited at bottom of page 37 of Appellants' Opening Brief.

thority that the original 1942 Delta Venture return was erroneous, it is not authority that the completed contract method should not be used when that is the only method which clearly reflects the income.

It follows, accordingly, that since the accrual method would not clearly reflect income from the Delta contract, Appellants are entitled to correct the errors in the 1942 return by correctly applying the completed contract method.

3. If the Delta War Venture Adopted the Accrual Method, It Is Entitled to Apply That Method Correctly.

In the previous pages of this brief, Appellants have set forth the reasons why the original 1942 Delta Venture return should have shown no receipts and no deductions. The Court below, however, apparently found that the 1942 return was erroneous "only" to the extent of \$472,722.15. Despite the fact that Appellants proved at least this portion of the full error claimed,¹⁰ the Court below held that Appellants could not recover. If this is the law, then it certainly is not good or just law.

But even apart from the basic injustice of the Court's decision below, Appellants have shown in their Opening Brief that they have complied with the most technical and stringent interpretation of the requirement that the claim for refund set forth the grounds upon which the refund is claimed.

Appellants noted in detail (Op. Br. 32-34) that the amended returns filed with the refund claims reduced the gross receipts reported as having accrued for 1942 by the amount of \$472,722.15,

10. Note again the authority that the completed contract method is only a specific application of the accrual method of accounting. See Footnote 7, *supra*, page 13 and the authorities cited therein. Appellants attempted to prove that all of the receipts should not have been accrued, but succeeded only in convincing the Court that a portion of the receipts should not have been accrued. Accordingly, the error proved was embraced within the larger error claimed.

and claimed that such receipts were advances only. This is clearly a claim that the original return was in error to the extent of \$472,722.15, as well as to the extent of the full amount. Appellee has not addressed its brief to the point made by Appellants. Instead, Appellee (bottom pg. 35, top pg. 36) has, in effect, stated that by asserting the right to correct the error by use of the completed contract method, Appellants have somehow waived the right to correct the error by any other method.

Appellee sets forth on page 34 and elsewhere in its brief the position that the claims for refund “were based upon the premise that taxpayers had elected to report the income of the Delta War Venture on the completed contract basis.” Appellee does not explain how it can take this position after its own counsel at the trial analyzed the language of the claims and told the Court that the essence of the claims was that the Appellants “made a mistake in filing them [the returns] on the accrual basis” (Tr. 136).

Appellee has not disputed that on the administrative level taxpayers took the alternative position that if they adopted the accrual method then there was still a substantial over-accrual of income. See Op. Br. 37. Appellee has also conceded in its brief that such administrative consideration is all that is necessary.¹¹ And as Appellants have previously demonstrated (page 10, *supra*), the Bureau of Internal Revenue was given the opportunity *on three different levels* to adjust this matter by recognizing the taxpayers’ claim that even on the accrual method an error had been made, but on each of the three administrative levels the taxpayers’ just and meritorious position was erroneously rejected.

Appellee has stated that Appellants did not raise the question of whether income was improperly reported on the accrual method

11. Br. 32: “It is well settled that a taxpayer who brings suit after a claim for refund has been denied can rely for recovery only on grounds presented to *or considered by* the Commissioner.” See cases cited at bottom of page 37 of Appellants’ Opening Brief.

at the trial (Br. 38). However, there was no need to present oral evidence that on the accrual method of accounting a very substantial error had been made. The evidence necessary to prove this was already in the stipulation of facts (Tr. 79). And as to the claim that in Appellants District Court brief it was argued only that all receipts were erroneously included as a result of a mistaken application of the completed contract method (Br. 38), Appellee is being somewhat inconsistent. For on page 9 of Appellee's brief in the District Court, the following is found:

"The taxpayers now contend in their brief filed here that the net income from this contract of \$206,250.44, as shown on that return, *was erroneously computed under the accrual method.*" (Italics added.)

Immediately thereafter in its District Court brief Appellee conceded that this position was taken by the taxpayers "at the trial of this case."

As to whether Appellants can urge here that refunds should be granted on the basis of correctly applying the accrual method of accounting, two points may be made. In the first place, the doctrine that new "theories" (*grounds* for relief, not *amount* of relief) may not be urged for the first time on appeal is based upon considerations of orderly judicial procedure. If the Court below actually does consider a theory not urged, there is no reason why its decision with respect to that theory should not be subject to review on appeal. Secondly, the Court below in considering this question, was simply following the requirements of Rule 54(c) of the Federal Rules of Civil Procedure. Under this rule, District Courts are required to grant whatever relief the evidence reveals the parties to be entitled to.¹² The reason the relief which is now requested was denied below was not that Appellants had not there requested such relief, but because the Court found (erroneously)

12. *Keiser v. Walsh* (1941), 118 F.2d 13; *Nester v. Western Union Teleg. Co.* (D.C. Cal, 1938), 25 F. Supp. 478.

that Appellants had not set forth as a *ground* for relief that some (but not all) of the Delta contract receipts were erroneously included in the 1942 return (Conclusion of Law III, Tr. 111).¹³

For ten frustrating years, the United States contended, contrary to the position maintained by taxpayers, that the 1942 return was correct. The taxpayers proved, and the District Court determined, that the return was erroneous. The United States now admits the error but contends, on the basis of highly procedural, technical and superficial arguments, that taxpayers should nevertheless be denied any refund. With respect to a somewhat similar but better founded effort on the part of the government, the Court of Appeals for the 10th Circuit said the following:

"The question is not free from doubt, but on the whole, we are of the opinion that the sufficiency of the claim for refund was not put in issue, and that the plaintiff is entitled to recover this tax. The defendant concedes that he is entitled to it on the merits; and while 'men must turn square corners when they deal with the Government' [citing a case], the government ought to turn square corners when dealing with its citizens. There is another maxim applicable in both of these appeals, and that is that substance should be given the right of way over form. [Citing cases.]

"The claim for refund should have been more particular; but if the defendant expected to avoid the repayment of this illegally collected tax on that account, he should have been more particular in his answer. The derelictions of the parties are about equal, and if the matter is at large, the tax ought to be repaid, for concededly the government has no right to it." (*Howbert v. Penrose*, 38 F.2d 577 at 581)

13. Appellee's argument that the record does not provide sufficient information to compute the income on the accrual basis has no merit. See footnote 3, page 11, *supra*. Even if the record were insufficient, Appellee overlooks the Supplemental Stipulation between the parties (Tr. 101) and the provisions of Rule 28 of this Court. See also *Underwood v. Comm'r* (4th Cir., 1932), 56 F.2d 67; *Comm'r v. Wells* (6th Cir., 1942) 132 F.2d 405.

CONCLUSION

The decision of the District Court was erroneous. The judgment should be reversed and the case remanded.

Respectfully submitted,

ERIC SUTCLIFFE

WILLIAM D. McKEE

ORRICK, DAHLQUIST, HERRINGTON
& SUTCLIFFE

Attorneys for Appellants

January 15, 1956

(Appendix Follows)

Appendix

Accounting Research Bulletin Number 45: Long-Term Construction-type Contracts

*Issued by the Committee on Accounting Procedure of the
American Institute of Accountants*

1. This bulletin is directed to the accounting problems in relation to construction-type contracts in the case of commercial organizations engaged wholly or partly in the contracting business. It does not deal with cost-plus-fixed-fee contracts, which are discussed in Chapter 11, Section A, of Accounting Research Bulletin No. 43 (*Restatement and Revision of Accounting Research Bulletins*, American Institute of Accountants, 1953), other types of cost-plus-fee contracts, or contracts such as those for products or services customarily billed as shipped or rendered. In general the type of contract here under consideration is for construction of a specific project. While such contracts are generally carried on at the job site, the bulletin would also be applicable in appropriate cases to the manufacturing or building of special items on a contract basis in a contractor's own plant. The problems in accounting for construction-type contracts arise particularly in connection with long-term contracts as compared with those requiring relatively short periods for completion.

2. Considerations other than those acceptable as a basis for the recognition of income frequently enter into the determination of the timing and amounts of interim billings on construction-type contracts. For this reason, income to be recognized on such contracts at the various stages of performance ordinarily should not be measured by interim billings.

GENERALLY ACCEPTED METHODS

3. Two accounting methods commonly followed by contractors are the percentage-of-completion method and the completed-contract method.

Percentage-of-completion Method.

4. The percentage-of-completion method recognizes income as work on a contract progresses. The committee recommends that the recognized income be that percentage of estimated total income, either:

(a) that incurred costs to date bear to estimated total cost after giving effect to estimates of costs to complete based upon most recent information, or

(b) that may be indicated by such other measure of progress toward completion as may be appropriate having due regard to work performed.

Costs as here used might exclude, especially during the early stages of a contract, all or a portion of the cost of such items as materials and subcontracts if it appears that such exclusion would result in a more meaningful periodic allocation of income.

5. Under this method current assets may include costs and recognized income not yet billed, with respect to certain contracts; and liabilities, in most cases current liabilities, may include billings in excess of costs and recognized income with respect to other contracts.

6. When the current estimate of total contract costs indicates a loss, in most circumstances provision should be made for the loss on the entire contract. If there is a close relationship between profitable and unprofitable contracts, such as in the case of contracts which are parts of the same project, the group may be treated as a unit in determining the necessity for a provision for loss.

7. The principal advantages of the percentage-of-completion method are periodic recognition of income currently rather than irregularly as contracts are completed, and the reflection of the status of the uncompleted contracts provided through the current estimates of costs to complete or of progress toward completion.

8. The principal disadvantage of the percentage-of-completion method is that it is necessarily dependent upon estimates of ulti-

mate costs and consequently of currently accruing income, which are subject to the uncertainties frequently inherent in long-term contracts.

Completed-contract Method.

9. The completed-contract method recognizes income only when the contract is completed, or substantially so. Accordingly, costs of contracts in process and current billings are accumulated but there are no interim charges or credits to income other than provisions for losses. A contract may be regarded as substantially completed if remaining costs are not significant in amount.

10. When the completed-contract method is used, it may be appropriate to allocate general and administrative expenses to contract costs rather than to periodic income. This may result in a better matching of costs and revenues than would result from treating such expenses as periodic costs, particularly in years when no contracts were completed. It is not so important, however, when the contractor is engaged in numerous projects and in such circumstances it may be preferable to charge those expenses as incurred to periodic income. In any case there should be no excessive deferring of overhead costs, such as might occur if total overhead were assigned to abnormally few or abnormally small contracts in process.

11. Although the completed-contract method does not permit the recording of any income prior to completion, provision should be made for expected losses in accordance with the well established practice of making provision for foreseeable losses. If there is a close relationship between profitable and unprofitable contracts, such as in the case of contracts which are parts of the same project, the group may be treated as a unit in determining the necessity for a provision for losses.

12. When the completed-contract method is used, an excess of accumulated costs over related billings should be shown in the

balance sheet as a current asset, and an excess of accumulated billings over related costs should be shown among the liabilities, in most cases as a current liability. If costs exceed billings on some contracts, and billings exceed costs on others, the contracts should ordinarily be segregated so that the figures on the asset side include only those contracts on which costs exceed billings, and those on the liability side include only those on which billings exceed costs. It is suggested that the asset item be described as "costs of uncompleted contracts in excess of related billings" rather than as "inventory" or "work in process," and that the item on the liability side be described as "billings on uncompleted contracts in excess of related costs."

13. The principal advantage of the completed-contract method is that it is based on results as finally determined, rather than on estimates for unperformed work which may involve unforeseen costs and possible losses.

14. The principal disadvantage of the completed-contract method is that it does not reflect current performance when the period of any contract extends into more than one accounting period and under such circumstances it may result in irregular recognition of income.

Selection of Method.

15. The committee believes that in general when estimates of costs to complete and extent of progress toward completion of long-term contracts are reasonably dependable, the percentage-of-completion method is preferable. When lack of dependable estimates or inherent hazards cause forecasts to be doubtful, the completed-contract method is preferable. Disclosure of the method followed should be made.

COMMITMENTS

16. In special cases disclosures of extraordinary commitments may be required, but generally commitments to complete contracts in process are in the ordinary course of a contractor's business and are not required to be disclosed in a statement of financial position. They partake of the nature of a contractor's business, and generally do not represent a prospective drain on his cash resources since they will be financed by current billings.

The statement entitled "Long-term Construction-type Contracts" was adopted unanimously by the twenty-one members of the committee, of whom two, Mr. Coleman and Mr. Dixon, assented with qualification.

Mr. Coleman and Mr. Dixon do not approve the statements in paragraphs 6 and 11 as to provisions for expected losses on contracts. They believe that such provisions should be made in the form of footnote disclosure or as a reservation of retained earnings, rather than by a charge against the revenues of the current period.

Mr. Coleman also questions the usefulness of the refinement of segregating the offset costs and billings by character of excess as set forth in the second sentence of paragraph 12. He suggests that a more useful alternative would be to show in any event total costs and total billings on all uncompleted contracts (a) with the excess shown either as a current asset or a current liability, and (b) with a supporting schedule indicating individual contract costs, billings, and explanatory comment.

NOTES

(See Introduction to Accounting Research Bulletin No. 43.)

1. *Accounting Research Bulletins represent the considered opinion of at least two-thirds of the members of the committee on accounting procedure, reached on a formal vote after examination of the subject matter by the committee and the research department. Except in cases in which formal adoption by the Institute*

membership has been asked and secured, the authority of the bulletins rests upon the general acceptability of opinions so reached.

2. Opinions of the committee are not intended to be retroactive unless they contain a statement of such intention. They should not be considered applicable to the accounting for transactions arising prior to the publication of the opinions. However, the committee does not wish to discourage the revision of past accounts in an individual case if the accountant thinks it desirable in the circumstances. Opinions of the committee should be considered as applicable only to items which are material and significant in the relative circumstances.

3. It is recognized also that any general rules may be subject to exception; it is felt, however, that the burden of justifying departure from accepted procedures must be assumed by those who adopt other treatment. Except where there is a specific statement of a different intent by the committee, its opinions and recommendations are directed primarily to business enterprises organized for profit.

AIA Committee on Accounting Procedure (1954-1955).

No. 15182

United States
Court of Appeals
for the Ninth Circuit

CONNECTICUT FIRE INSURANCE COMPANY,

Appellant,

vs.

AGNES H. REMILLARD, Administratrix of the Estate of
Edward S. Remillard, Deceased,

Appellant.

AGNES H. REMILLARD, Administratrix of the Estate of
Edward S. Remillard, Deceased,

Appellant,

vs.

CONNECTICUT FIRE INSURANCE COMPANY, and
NORTHWEST CASUALTY CO.,

Appellees.

NORTHWEST CASUALTY CO.,

Appellant,

vs.

AGNES H. REMILLARD, Administratrix of the Estate of
Edward S. Remillard, Deceased,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
District of Oregon

FILED

OCT 29 1956

No. 15182

United States
Court of Appeals
for the Ninth Circuit

CONNECTICUT FIRE INSURANCE COMPANY,

Appellant,

vs.

AGNES H. REMILLARD, Administratrix of the Estate of
Edward S. Remillard, Deceased,

Appellant.

AGNES H. REMILLARD, Administratrix of the Estate of
Edward S. Remillard, Deceased,

Appellant,

vs.

CONNECTICUT FIRE INSURANCE COMPANY, and
NORTHWEST CASUALTY CO.,

Appellees.

NORTHWEST CASUALTY CO.,

Appellant,

vs.

AGNES H. REMILLARD, Administratrix of the Estate of
Edward S. Remillard, Deceased,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Agreed Statement of Facts.....	16
Ex. A—Insurance Policy No. ACC 10763.	21
B—Certificate of Insurance.....	30
C—Standard Automobile Policy, Northwest Casualty Co.....	32
D—Certificate of Insurance.....	33
Allegations of Plaintiff.....	3
Ex. A—Endorsement Approved by the Public Utilities Commissioner of Oregon, Form MP-944.....	5
Allegations of Plaintiff, Supplemental.....	9
Answer of Connecticut Fire Insurance Co. to Allegations	6
Answer of Northwest Casualty Co. to Allega- tions	7
Answer of Connecticut Fire Insurance Co. to Supplemental Allegations	14
Answer of Northwest Casualty Co. to Supple- mental Allegations	12

	INDEX	PAGE
Appeal:		
Certificate of Clerk to Record on.....		73
Designation of Record on.....		80
Notice of		58, 59
Statement of Points on (USDC).....		59, 61
Statement of Points on (USCA).....		76, 77, 78
Attorneys, Names and Addresses of.....		1
Certificate of Clerk.....		73
Deposition of Charles Cox.....		64
Designation of Record on Appeal, Agnes H. Remillard		80
Findings of Fact and Conclusions of Law.....		49
Judgment		57
Notice of Appeal, Connecticut Fire Insurance Co.		58
Notice of Appeal, Northwest Casualty Co.....		59
Notice of Appeal, Agnes H. Remillard.....		58
Objections of Connecticut Fire Insurance Co. to Proposed Findings of Fact and Conclu- sions of Law.....		35

INDEX	PAGE
Objections of Northwest Casualty Co. to Proposed Findings of Fact and Conclusions of Law	42
Proposed Additional and Amended Findings of Fact, etc., of Connecticut Fire Insurance Co.	38
Proposed Additional and Amended Findings of Fact and Conclusions of Law of Northwest Casualty Co.	45
Reply to Answers of Connecticut Fire Insurance Co.	15
Reply to Answers of Northwest Casualty Co...	15
Statement of Points on Which Connecticut Fire Insurance Co. Intends to Rely (USDC)....	59
Statement of Points of Northwest Casualty Co. (USDC)	61
Statement of Points on Appeal, Agnes H. Remillard (USCA)	78
Statement of Points and Designation of Record, Adoption of, Connecticut Fire Insurance Co. (USCA)	76
Statement of Points and Designation of Record, Northwest Casualty Co. (USCA).....	77

NAMES AND ADDRESSES OF ATTORNEYS

FLEGEL, VOSBURG, JOSS & HEDLUND;

FRANK McK. BOSCH,

909 American Bank Building,

Portland, Oregon,

For Agnes H. Remillard.

MAGUIRE, SHIELDS, MORRISON &

BAILEY;

HOWARD K. BEEBE,

723 Pittock Block,

Portland, Oregon,

For Connecticut Fire Insurance Company.

PHILLIPS & SANDEBERG;

WILLIAM C. RALSTON,

909 Public Service Building,

Portland, Oregon,

For Northwest Casualty Company.

[Title of District Court and Cause.]

Civil No. 7891

ALLEGATIONS OF PLAINTIFF

Comes now the plaintiff and alleges:

I.

That the above-entitled action was commenced by the plaintiff to recover damages sustained by the estate of plaintiff's intestate as a result of said intestate's wrongful death which occurred as a result of an automobile accident; that the trial of the above-entitled action has culminated in a judgment in favor of plaintiff and against defendants, and each of them, in the sum of \$10,000.00 plus costs and disbursements taxed at \$189.70, which judgment was made and entered in the above court on June 7, 1955; that no part of said judgment has been paid.

II.

That on December 6, 1954, the above-named defendant Charles Cox also known as Charlie Cox, was the named insured in a policy of bodily injury liability and property damage liability insurance which had been issued by garnishee Connecticut Fire Insurance Company, said policy being more particularly described as policy No. ACC10763.

III.

That on December 6, 1954, the above-named defendant Charles Cox, also known as Charlie Cox, was the named insured in a policy of bodily injury liability and property damage liability insurance

which had been issued by garnishee Northwest Casualty Co., said policy being more particularly described as policy No. 9063892.

IV.

That attached to and forming a part of both of said insurance policies was an endorsement approved by the Public Utilities Commissioner of Oregon, Form MP-944, and said endorsements were in full force and effect on December 6, 1954; that a copy of said Form MP-944 is attached hereto marked "Exhibit A" and by this reference made a part hereof as if fully set forth herein.

V.

That the motor vehicles which were in the aforesaid accident of December 6, 1954, which were owned by defendant Charles Cox and being operated by his employee, defendant Albert Earl Jones, were included within the coverage afforded by said policies of insurance and the endorsements thereto, and in accordance with the terms thereof the garnishees Connecticut Fire Insurance Company and Northwest Casualty Co., and each of them, were obligated to pay the judgment heretofore entered in favor of plaintiff and against the defendants for damages sustained by reason of the wrongful death of plaintiff's intestate.

VI.

That a writ of execution has heretofore been issued by the Clerk of the above-entitled court and that in response to a notice of garnishment directed

to them the garnishees Connecticut Fire Insurance Company and Northwest Casualty Co. have filed herein their certified answers thereto, which in substance set forth that neither of them has any money or other property of any nature owing to the above-named defendants, or either of them; that said certificates of the garnishees in their present form are unsatisfactory to the plaintiff.

VII.

That the plaintiff has served the foregoing allegations upon said garnishees together with written interrogatories.

Wherefore plaintiff demands judgment against the garnishee, Connecticut Fire Insurance Company and Northwest Casualty Co., and each of them, for the sum of \$10,189.70, together with interest thereon at the rate of six per cent (6%) per annum from June 7, 1955.

/s/ FRANK McK. BOSCH,
Of Attorneys for Plaintiff.

EXHIBIT A

[Exhibit A attached to the foregoing is identical to the endorsement set out in full as part of Exhibit A attached to the Agreed Statement of Facts. See page 23 of this printed record.]

Service of copy acknowledged.

[Endorsed]: Filed December 12, 1955.

[Title of District Court and Cause.]

ANSWER OF GARNISHEE, CONNECTICUT
FIRE INSURANCE COMPANY, TO ALLE-
GATIONS OF PLAINTIFF

Comes now, Connecticut Fire Insurance Com-
pany, garnishee, and for answer to the allegations
of plaintiff on file herein, denies each and every al-
legation and the whole thereof except that this gar-
nishee admits Paragraphs I, II, III, IV, VI and
VII thereof.

For Further, Separate and Affirmative Answer to
the Allegations of Plaintiff This Garnishee
Alleges:

I.

Under the terms of said policy issued by this gar-
nishee to said Charlie Cox, coverage was expressly
excluded when either the 1948 Autocar tractor de-
scribed in said policy, or the 1952 Homemade semi-
trailer described therein was operated as a part
of a truck and trailer unit or as a part of a tractor
and trailer unit, the other portion of which was not
insured by this defendant.

II.

At the time of the accident referred to in Para-
graph I of plaintiff's allegations, said 1952 Home-
made trailer was being operated while attached to
a certain 1948 Peterbuilt tractor which was then
and there owned by said Charlie Cox and which
was and is not insured by this defendant.

III.

At the time and place of said accident, said equipment was not being operated pursuant to a license or permit of the Public Utilities Commissioner of Oregon in that said vehicle was being driven to Portland, Oregon, for the sole purpose of having repairs made upon the said Peterbuilt tractor and for no other purpose. The endorsement referred to in Paragraph IV of plaintiff's allegations was not and is not, therefore, applicable to said accident nor the judgment referred to in Paragraph I of plaintiff's allegations.

Wherefore, garnishee, Connecticut Fire Insurance Company, prays that plaintiff take nothing and that plaintiff's allegations be dismissed.

/s/ W. H. MORRISON,

/s/ HOWARD K. BEEBE.

Service of copy acknowledged.

[Endorsed]: Filed December 14, 1955.

[Title of District Court and Cause.]

ANSWER OF GARNISHEE NORTHWEST
CASUALTY COMPANY

Comes now the Northwest Casualty Company, garnishee, and for answer to the allegations of the plaintiff, admits, denies and alleges as follows:

I.

Admits the allegations of Paragraphs I, VI and VII.

II.

The garnishee has no information sufficient to form a belief and therefore denies the allegations of Paragraph II.

III.

Denies the allegations of Paragraphs III and V.

IV.

Admits the allegations of Paragraph IV except that the copy of Form MP-944 attached as a substantial copy.

Wherefore, having fully answered, the garnishee Northwest Casualty Company prays for a judgment dismissing the allegations as to it and for its costs and disbursements.

/s/ WM. C. RALSTON,
Of Attorneys for
Northwest Casualty Co.

Service of copy acknowledged.

[Endorsed]: Filed December 16, 1955.

In the District Court of the United States for the
District of Oregon

Civil No. 7891

AGNES H. REMILLARD, Administratrix of the
Estate of Edward S. Remillard, Deceased,

Plaintiff,

vs.

CHARLES COX and ALBERT EARL JONES,

Defendants,

CONNECTICUT FIRE INSURANCE COM-
PANY,

Garnishee,

NORTHWEST CASUALTY CO.,

Garnishee.

SUPPLEMENTAL ALLEGATIONS OF PLAINTIFF

Comes now the plaintiff, leave of court having
been first obtained, and files herewith supplemental
allegations, to wit:

I.

That the above-entitled action was commenced by
the plaintiff to recover damages sustained by the
estate of plaintiff's intestate as a result of said in-
testate's wrongful death which occurred as a result
of an automobile accident; that the trial of the
above-entitled action has culminated in a judgment
in favor of plaintiff and against defendants, and

each of them, in the sum of \$10,238.00 plus costs and disbursements taxed at \$189.70, which judgment was made and entered in the above court on June 7, 1955; that no part of said judgment has been paid.

II.

That on December 6, 1954, the above-named defendant Charles Cox, also known as Charlie Cox, was the named insured in a policy of bodily injury liability and property damage liability insurance which had been issued by garnishee Connecticut Fire Insurance Company, said policy being more particularly described as policy No. ACC10763.

III.

That on December 6, 1954, the above-named defendant Charles Cox, also known as Charlie Cox, was the named insured in a policy of bodily injury liability and property damage liability insurance which had been issued by garnishee Northwest Casualty Co., said policy being more particularly described as policy No. 9063892.

IV.

That attached to and forming a part of both of said insurance policies was an endorsement approved by the Public Utilities Commissioner of Oregon, Form MP-944, and said endorsements were in full force and effect on December 6, 1954; that a copy of said Form MP-944 is attached hereto marked "Exhibit A" and by this reference made a part hereof as if fully set forth herein.

V.

That the motor vehicles which were in the aforesaid accident of December 6, 1954, which were owned by defendant Charles Cox and being operated by his employee, defendant Albert Earl Jones, were included within the coverage afforded by said policies of insurance and the endorsements thereto, and in accordance with the terms thereof the garnishees Connecticut Fire Insurance Company and Northwest Casualty Co., and each of them, were obligated to pay the judgment heretofore entered in favor of plaintiff and against the defendants for damages sustained by reason of the wrongful death of plaintiff's intestate.

VI.

That a writ of execution has heretofore been issued by the clerk of the above-entitled court and that in response to a notice of garnishment directed to them the garnishees Connecticut Fire Insurance Company and Northwest Casualty Co., have filed herein their certified answers thereto, which in substance set forth that neither of them has any money or other property of any nature owing to the above-named defendants, or either of them; that said certificates of the garnishees in their present form are unsatisfactory to the plaintiff.

VII.

That on or about June 27, 1955, the plaintiff notified the garnishees Connecticut Fire Insurance Company and Northwest Casualty Co. of the entry of the judgment referred to in Paragraph I hereof,

and demanded settlement and satisfaction thereof. That more than six months have expired since said notification and demand and said garnishees have failed and refused to make any settlement or payment on said judgment. That pursuant to the provisions of ORS 736.325 plaintiff is entitled to recover in addition to the amount of said judgment such sum as the above-entitled court may adjudge reasonable as her attorney's fees in this proceeding.

VIII.

That the plaintiff has served the foregoing allegations upon said garnishees.

Wherefore plaintiff demands judgment against the garnishees Connecticut Fire Insurance Company and Northwest Casualty Co., and each of them, for the sum of \$10,427.70, together with interest thereon at the rate of six per cent (6%) per annum from June 7, 1955, and such sum as the court may adjudge reasonable as her attorney's fees in this proceeding.

/s/ FRANK McK. BOSCH,
Of Attorneys for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed March 16, 1956.

[Title of District Court and Cause.]

ANSWER

Comes now Northwest Casualty Company as garnishee and for answer to the supplemental allegations of the plaintiff admits, and denies as follows:

I.

Admits the allegations of Paragraphs I, III, IV, VI and VIII.

II.

The answering garnishee has no information regarding the truth of the allegations regarding the information in Paragraph II, therefore, denies the same.

III.

Denies the allegations of Paragraph V.

IV.

Answering the allegations of Paragraph VII, admits that the plaintiff notified the Northwest Casualty Co. of the entry of the judgment and demanded settlement thereof and that more than six months have elapsed since the date of such notification and denies the remaining allegations in said paragraph.

Wherefore, having fully answered, the Northwest Casualty Co. garnishee prays for judgment and decree dismissing the supplemental allegations of the plaintiff.

/s/ WM. C. RALSTON,

Of Attorneys for Northwest
Casualty Company.

Service of copy acknowledged.

[Endorsed]: Filed February 14, 1956.

[Title of District Court and Cause.]

ANSWER OF GARNISHEE, CONNECTICUT
FIRE INSURANCE COMPANY, TO SUP-
PLEMENTAL ALLEGATIONS OF PLAIN-
TIFF

Comes now Connecticut Fire Insurance Com-
pany, garnishee, and for answer to the Supple-
mental Allegations of plaintiff on file herein, denies
each and every allegation therein contained and
the whole thereof, except as expressly admitted,
stated or qualified herein or in the answer of this
garnishee to the allegations of plaintiff heretofore
filed herein, and except that this garnishee admits
that on or about June 27, 1955, plaintiff notified
this garnishee and the Northwest Casualty Co., of
the entry of the judgment referred to in Para-
graph I of said Supplemental Allegations of plain-
tiff and admits that more than six months have ex-
pired since said notification.

Wherefore, having fully answered, this garnishee
prays that plaintiff take nothing.

/s/ W. H. MORRISON,

/s/ HOWARD K. BEEBE.

Service of copy acknowledged.

[Endorsed]: Filed February 23, 1956.

[Title of District Court and Cause.]

REPLY OF PLAINTIFF TO ANSWERS OF
GARNISHEE, CONNECTICUT FIRE IN-
SURANCE COMPANY

Comes now the plaintiff and for reply to the answers of garnishee, Connecticut Fire Insurance Company, to allegations and supplemental allegations of plaintiff denies each and every allegation contained in said answers and the whole thereof, except such portions thereof as admit allegations of plaintiff and supplemental allegations of plaintiff.

Wherefore, plaintiff reiterates the prayer contained in supplemental allegations of plaintiff.

/s/ FRANK BOSCH,
Attorney for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed March 19, 1956.

[Title of District Court and Cause.]

REPLY OF PLAINTIFF TO ANSWERS OF
GARNISHEE, NORTHWEST CASUALTY
COMPANY

Comes now the plaintiff and for reply to the answers of garnishee, Northwest Casualty Co., to allegations and supplemental allegations of plaintiff

denies each and every allegation contained in said answers and the whole thereof, except such portions thereof as admit allegations of plaintiff and supplemental allegations of plaintiff.

Wherefore, plaintiff reiterates the prayer contained in supplemental allegations of plaintiff.

/s/ FRANK McK. BOSCH,
Attorney for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed March 19, 1956.

[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS

This matter is before the court as a proceeding on and in aid of a writ of execution heretofore issued by the clerk of the above-entitled court and pursuant to Federal Rules of Civil Procedure, Rule 69, is conducted in accordance with the practice and procedure in such cases provided by the statutes of the State of Oregon. The issues are framed by the following pleadings on file herein:

- (1) Allegations of plaintiff;
- (2) Answer of garnishee Connecticut Fire Insurance Company;
- (3) Answer of garnishee Northwest Casualty Company;
- (4) Supplemental allegations of plaintiff;
- (5) Answer of garnishee Connecticut Fire Insurance to Supplemental Allegations of Plaintiff;

(6) Answer of garnishee Northwest Casualty Co. to Supplemental Allegations of Plaintiff;

(7) Reply of plaintiff to answers of garnishees.

Admitted Facts

The following facts have been agreed upon by the parties hereto by and through their respective attorneys and require no proof:

I.

The above-entitled action was commenced by the plaintiff to recover damages sustained by the estate of plaintiff's intestate as a result of said intestate's wrongful death which occurred in an automobile accident on December 6, 1954, near The Dalles, Oregon. The trial of the above-entitled action has culminated in a judgment in favor of plaintiff and against defendants, and each of them, in the sum of \$10,238.00 plus costs and disbursements taxed at \$189.70. Said judgment was made and entered in the above-entitled court on June 7, 1955, and no part of said judgment has been paid.

II.

On December 6, 1954, the above-named defendant Charles Cox, also known as Charlie Cox, was the named insured in a policy of bodily injury liability and property damage liability insurance which had been issued by garnishee, Connecticut Fire Insurance Company, as policy No. ACC10763. A true copy of said policy No. ACC10763 is attached hereto marked "Exhibit A". On December 6, 1954,

there was in full force and effect a Certificate of Insurance on file with the Public Utilities Commissioner of Oregon which had been issued under said policy No. ACC10763 in compliance with the Motor Transportation Code of Oregon and the pertinent rules and regulations of the Public Utilities Commissioner of Oregon, and a photostatic copy of said Certificate of Insurance is attached hereto marked "Exhibit B."

III.

Prior to March 19, 1954, the garnishee Northwest Casualty Company had issued a policy of bodily injury liability and property damage liability insurance to one Robert L. Ellis of Spokane, Washington, said policy being No. 906-3892. A specimen copy of said policy is attached hereto marked "Exhibit C". The daily report relating to said policy No. 906-3892 discloses that the Schedule of Automobiles specifically described as covered by said policy included a 1951 Ford F8 truck, motor No. FE1LB13758 and a 1953 Freuhauf semi-trailer, motor No. C28000. Said daily report also discloses that the name of the original insured, Robert L. Ellis, was crossed off and the name of the defendant Charlie Cox was substituted therefor in longhand. On December 6, 1954, there was in full force and effect a Certificate of Insurance on file with the Public Utilities Commissioner of Oregon which had been issued under said policy No. 906-3892 in favor of defendant Charles Cox and in compliance with the Motor Transportation Code of Oregon and the pertinent rules and regulations of the Public Utili-

ties Commissioner of Oregon. A photostatic copy of said Certificate of Insurance is attached hereto marked "Exhibit D".

IV.

Attached to and forming a part of both of said insurance policies was an endorsement approved by the Public Utilities Commissioner of Oregon (MP-944) and said endorsements were in full force and effect on December 6, 1954.

V.

A writ of execution has heretofore been issued by the clerk of the above-entitled court and that in response to a notice of garnishment directed to them the garnishees Connecticut Fire Insurance Company and Northwest Casualty Company, have filed herein their certified answers thereto, which in substance set forth that neither of them has any money or other property of any nature owing to the above-named defendants or either of them.

VI.

The motor vehicles which were involved in the aforesaid accident of December 6, 1954, which were owned by defendant Charles Cox and being operated by his employee, defendant Albert Earl Jones, were the following, to wit:

(1) A 1948 Peterbilt semitractor, motor or I.D. No. 50608, which was towing a

(2) 1952 Homemade semi-trailer, motor or I.D. No. 173068.

At the time of the accident the defendant Albert Earl Jones was operating said equipment from

Pasco, Washington, to Portland, Oregon. While the parties hereto do not specifically stipulate as to the purpose for which said equipment was being used at the time of the accident, it is nevertheless stipulated and agreed that if defendant Charles Cox was called to testify concerning said purpose he would testify to the same effect as he did in his deposition taken February 2, 1956, which deposition has heretofore been transcribed and filed herein.

VII.

The 1952 Homemade semi-trailer referred to in Paragraph VI hereof was the same trailer specifically described in Connecticut policy No. ACC10763; said policy, however, did not describe said 1948 Peterbilt semi-tractor.

VIII.

That plaintiff has complied with the requirements of ORS 736-325 relating to the giving of notice to the garnishees and more than six months has expired since receipt of said notice.

/s/ FRANK BOSCH,

Of Attorneys for Agnes H. Remillard, Administratrix of the Estate of Edward S. Remillard, Deceased.

/s/ HOWARD K. BEEBE,

Of Attorneys for Garnishee, Connecticut Fire Insurance Company.

/s/ WM. C. RALSTON,

Of Attorneys for Garnishee, Northwest Casualty Company.

EXHIBIT A

RENEWAL OF NO.

The Connecticut

Fire Insurance Company

of Hartford, State of Connecticut.

ORGANIZED 1850 CAPITAL \$2,000,000

PACIFIC DEPARTMENT, SAN FRANCISCO, CALIFORNIA

TERMS OF INSURANCE

Name of insured: CHARLIE COX
 Address: 4TH AND LEWIS, PASCO, WASHINGTON
 Occupation: CONTRACTOR - SELF
 Ownership: Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the insured is the sole owner of the automobile, except as herein stated:
 Loss Payee: Any loss under coverages D, E, F, G and H is payable as interest may appear to the named insured and NO EXCEPTIONS
 Garage: The automobile will be principally garaged in the above town or city, county and state, unless otherwise stated herein: NO EXCEPTIONS
 Policy Period: FROM JUNE 15, 1954 TO JUNE 15, 1955
 12:01 A.M., standard time at the address of the insured as stated herein.

The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

COVERAGES	LIMITS OF LIABILITY	PREMIUM
Injury Liability	\$ 25,000.00 each person \$ 5,000.00 each accident	(1) (2) \$ 66.70 6.67
Damage Liability	\$ 5,000.00 each accident	\$112.00 11.20
Payments	each person	\$
Comprehensive—Loss of or Damage to the Automobile, Except by Collision or Upset but including Fire, Theft and Windstorm		\$
Collision or Upset	Actual Cash Value less \$ deductible	\$
Lightning and Transportation	\$	\$
(Road Form)	\$	\$
Uninsured Additional Coverage	\$	\$
	\$ HIRED - NON OWNED	\$ BT 5.80 PD 1.0
#1 CLASS 3CB, ITEM #2, 10% OF CLASS 3CB	Total Premium	\$ 203.37

Description of the automobile and facts respecting its purchase by the named insured and terms of any encumbrance:

Trade Name	Model	Body Type; Truck Size; Truck Load Capacity; Tank Gallonage Capacity; or Bus Seating Capacity	Serial Number or Motor Number	Number of Cylinders
AUTO CAR	TRACTOR	9000# GROSS	(C70T164) (45-5813)	
HOME-OWNED	SEMI TRAILER	9000# GROSS	S173068WN	

at Price or ed Price actory	Actual Cost When Purchased Including Equipment	Purchased	Encumbrance	Installation Payments	Due Date and Amount of Final Installment
Month	Year	New or Used	Number	Amount of Each	
\$			\$	\$	\$

Use: The purposes for which the automobile is to be used are "pleasure and business," unless otherwise stated herein:

COMMERCIAL

(a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as use principally in the business occupation of the named insured as stated in item 1, including occasional use for personal, pleasure, family and other business purposes. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

dated: JUNE 17, 1954
 at PASCO, WASHINGTON

By _____
 Authorized Agent

Exclusions

This policy does not apply:

* * *

(c) under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company;

* * *

Oregon Public Utilities Commissioner

Endorsement for Motor Carrier Policies of Insurance for Bodily Injury Liability and Property Damage Liability—Automatic Coverage

The policy to which this endorsement is attached is an automobile bodily injury liability and property damage liability policy, and is hereby amended to assure compliance by the named insured, as a motor carrier of passengers or property with appropriate provisions of the Motor Transportation Code of Oregon, as amended, and the pertinent rules and regulations of the Public Utilities Commissioner of Oregon, promulgated in accordance with the provisions of the Motor Transportation Code of Oregon.

In consideration of the premium stated in the policy to which this endorsement is attached, or be-

comes a part, when duly countersigned, the company hereby agrees to pay any final judgment recovered against the named insured for bodily injury to or the death of any persons or loss of or damage to property of others (excluding injury to or death of the named insured's employees while engaged in the course of their employment, and loss of or damage to property owned or operated by or in the care, custody or control of the named insured, and property transported by the named insured, designated as cargo, and to any obligation for which the named insured may be held liable under any workmen's compensation law), resulting from the negligent operation, maintenance, ownership, or use of motor vehicles under permit issued to the named insured by the Public Utilities Commissioner of Oregon, or otherwise under the Oregon Motor Transportation Code, within the limits of liability hereinafter provided, regardless of whether such motor vehicles are specifically described in the policy or not. It is understood and agreed that upon failure of the company to pay any such final judgment recovered against the named insured, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment. The bankruptcy or insolvency of the name insured shall not relieve the company of any of its obligations hereunder. The liability of the company extends to such losses, damages, injuries, or deaths whether occurring on the route or in the territory authorized to be served by the named insured or elsewhere, within the State of

Oregon, but as respects this endorsement only while operating under the provisions of the Motor Transportation Code of Oregon.

The liability of the company on each motor vehicle for the following limits shall be a continuing one notwithstanding any recovery hereunder, in the following minimum amounts:

Type of Motor Vehicle

Each motor vehicle authorized for use in the transportation of property or persons.

Bodily Injury Limit for Each Person
\$10,000. Liability Limit for Each Accident
\$20,000. Property Damage Liability
Limit for Each Accident \$10,000.

In the event the policy to which this endorsement is attached is issued for limits greater than those prescribed herein, the terms and conditions of this endorsement shall apply only to the minimum limits set forth in this endorsement.

Nothing contained in the policy or any endorsements thereon, nor the violation of any of the provisions of the policy or of any endorsement thereon by the named insured, shall relieve the company from liability hereunder or from the payment of any such final judgment, but as respects any equipment of the named insured while being operated by others under an interchange of equipment agreement or requirement, the insurance afforded by this

policy shall be excess over any other valid and collectible insurance available to the named insured.

The named insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

Cancellation of this endorsement or of the policy to which it is attached may be effected by the company or the named insured giving not less than 15 days' notice in writing to the Public Utilities Commissioner of Oregon at his office in Salem, Oregon, said notice to commence to run from the date notice is actually received at the office of said Commissioner.

Attached to and forming part of Policy No. ACC 10763 issued by the Connecticut Fire Insurance Company (herein called company) of Hartford, Connecticut.

To Charlie Cox of Pasco, Washington.

Dated at Pasco, Washington this 4th Day of October, 1954.

.....

Authorized Company
Representative.

Standard Form of Endorsement Prescribed by the
Washington Public Service Commission

To Be Attached to and Made a Part of All Policies
Insuring Motor Freight Carriers Subject to
Regulation by the Washington Public Service
Commission

(Form MV 1)

(Supersedes all endorsements heretofore required
by said Commission)

The policy to which this endorsement is attached is an Automobile Bodily Injury Liability and Property Damage Liability policy, and is hereby amended to assure compliance by the insured, as a motor carrier of property, with appropriate provisions of law (Chapter 184, Laws of 1935 and acts amendatory thereof and supplemental thereto); and with the pertinent rules, orders and regulations of the Washington Public Service Commission.

In consideration of the premium provided for in the policy of which this endorsement is made a part the Company agrees that within the classes of coverage provided by the policy it will pay any final judgment rendered against the insured for bodily injuries to or death of any person or persons other than the named insured, or damage to or destruction of property, or both, arising out of the ownership, maintenance or use of any vehicle operated under authority of the aforesaid statutes, although such vehicle may not be specifically described in the policy; that the judgment creditor may maintain an

of one or more than one claimant in any one accident.

Nothing in this endorsement shall be construed to limit or restrict any coverage otherwise provided by the policy of which this endorsement is made a part.

When countersigned by an authorized representative of the Company this endorsement becomes a part of Policy No. ACC 10763 issued by Connecticut Fire Insurance Company (herein called Company) to Charlie Cox effective June 15, 1954 at 12:01 a.m., standard time at the address of the insured as stated in said policy.

Countersigned at Pasco, Washington, this 17th day of June, 1954.

By

Authorized Company
Representative.

Note: This endorsement must be executed in accordance with "Conditions" of the policy.

EXHIBIT B

55417-57025-64212

Motor Carrier Bodily Injury Liability and Property
Damage Liability Automatic Coverage

Certificate of Insurance

Certificate No.

To be filed with the Public Utilities Commissioner,
Salem, Oregon.

Motor Carrier Automobile Bodily Injury Liability
and Property Damage Liability Automatic
Coverage

Certificate of Insurance

Filed with

Public Utilities Commissioner, Salem, Oregon

This Is To Certify, that the Connecticut Fire Insurance Company (hereinafter called company) of Hartford, Connecticut has issued to Charlie Cox of 4th and Lewis, Pasco, Washington the policy of automobile bodily injury liability and property damage liability insurance herein described which by the attachment of endorsement approved by the Public Utilities Commissioner of Oregon, Form No. MP-944, has been amended to provide the coverage or security for the protection of the public required with respect to the operation, maintenance, ownership, or use of motor vehicles under permit issued to the named insured by the Public Utilities Commissioner of Oregon or otherwise under the Motor Transportation Code and the pertinent rules and regulations of the Public Utilities Commissioner of Oregon, regardless of whether such motor vehicles are specifically described in the policy or not. The liability of the company extends to all losses, damages, injuries, or deaths whether occurring on the route or in the territory authorized to be served by the named insured or elsewhere, within the state of Oregon.

Whenever requested by the Commissioner, the company agrees to furnish to the Commissioner a duplicate original of said policy and all endorsements thereon.

This certificate effective from September 10, 1954, to June 15, 1955 (12:01 a.m., standard time at the address of the named insured as stated in said policy), issued under Policy No. ACC 10763, and supersedes and cancels certificate effective.....
....., 19.....

No. issued under above policy.

Countersigned at San Francisco, California, this 4th day of October, 1954.

/s/ H. NIELAUS,
Authorized Company
Representative.

EXHIBIT C

* * *

Exclusions

* * *

(c) under Coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the Company; or while any trailer cov-

ered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the Company;

* * *

EXHIBIT D

Motor Carrier Bodily Injury Liability and
Property Damage Liability Automatic Coverage

Certificate of Insurance

Certificate No. 2

To be filed with the Public Utilities Commissioner,
Salem, Oregon.

Motor Carrier Automobile Bodily Injury Liability
and Property Damage Liability Automatic
Coverage

Certificate of Insurance

Filed with Public Utilities Commissioner
Salem, Oregon

This is to Certify, that the Northwest Casualty Company, (hereinafter called company) of 217 Pine Street, Seattle, Washington, has issued to Charlie Cox of 507 N. 4th, Pasco, Wash. the policy of automobile bodily injury liability and property damage liability insurance herein described which by the attachment of endorsement approved by the Public Utilities Commissioner of Oregon, Form No. MP-944, has been amended to provide the coverage or

security for the protection of the public required with respect to the operation, maintenance, ownership, or use of motor vehicles under permit issued to the named insured by the Public Utilities Commissioner of Oregon or otherwise under the Motor Transportation Code and the pertinent rules and regulations of the Public Utilities Commissioner of Oregon, regardless of whether such motor vehicles are specifically described in the policy or not. The liability of the company extends to all losses, damages, injuries, or deaths whether occurring on the route or in the territory authorized to be served by the named insured or elsewhere, within the state of Oregon.

Whenever requested by the Commissioner, the company agrees to furnish to the Commissioner a duplicate original of said policy and all endorsements thereon.

This certificate effective from September 10, 1954, to March 19, 1955, (12:01 a.m., standard time at the address of the named insured as stated in said policy), and supersedes and cancels certificate effective September 22, 1954, No. 1, issued under Policy No. 906-3892.

Countersigned at Seattle, Wash., this 6th day of October, 1954.

/s/ W. H. CRESMAN,

Authorized Company Representative.

[Endorsed]: Filed April 2, 1956.

In the District Court of the United States for the
District of Oregon

Civil No. 7891

AGNES H. REMILLARD, Administratrix of the
Estate of Edward S. Remillard, Deceased,
Plaintiff,

vs.

CHARLES COX and ALBERT EARL JONES,
Defendants,

CONNECTICUT FIRE INSURANCE COM-
PANY,

Garnishee,

NORTHWEST CASUALTY CO.,

Garnishee,

OBJECTIONS OF GARNISHEE, THE CON-
NECTICUT FIRE INSURANCE COM-
PANY, TO PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

Comes now The Connecticut Fire Insurance Com-
pany, garnishee herein, and respectfully objects to
the findings of fact and conclusions of law as fol-
lows:

I.

Objects to finding number VI, upon the ground
and for the reason that the same is not a finding of
fact but is a conclusion of law; upon the ground
and for the reason that the same disregards en-

tirely the force and effect of Exclusion "c" of this garnishee's policy which reads as follows:

"(c) under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company;"

II.

Objects further to any inferred or implied finding that the vehicles involved in the accident were being operated pursuant to any permit issued by the Public Utilities Commissioner of the State of Oregon upon the ground and for the reason that the evidence affirmatively shows that it was not necessary to have a permit from the Public Utilities Commissioner of the State of Oregon in order to operate said vehicles upon the highway at the time and place of the accident which gave rise to plaintiff's judgment herein.

III.

Objects to conclusion of law number I, upon the ground and for the reason that the evidence affirmatively shows that the insurance policy of this garnishee excluded coverage for the accident which gave rise to plaintiff's judgment because said policy did not specifically describe the 1948 Peterbuilt tractor which was involved in that accident and specifically excluded coverage with respect to said

homemade trailer while it was being towed by any vehicle other than the 1948 Autocar tractor described in this garnishee's said policy; and this garnishee further objects to said conclusion of law upon the ground and for the reason that even if this garnishee is liable by virtue of the Public Utilities Commissioner's endorsement (MP-944) attached to said policy it would, in any event, be liable only to the extent of \$10,000.00 and would not be liable for the full amount of said judgment.

IV.

Objects to conclusion of law number II, upon the ground and for the reason that there is not competent or substantial evidence to support a judgment against this garnishee and upon the further ground that the evidence affirmatively shows that this garnishee is not liable to plaintiff for any sum whatsoever.

/s/ HOWARD K. BEEBE.

Service of Copy acknowledged.

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause.]

GARNISHEE, THE CONNECTICUT FIRE
INSURANCE COMPANY'S PROPOSED
OTHER, ADDITIONAL AND AMENDED
FINDINGS OF FACT AND CONCLU-
SIONS OF LAW

This matter coming on regularly for trial before the Hon. William G. East, Judge of the above-entitled court, on April 5, 1956, to determine whether the garnishees, The Connecticut Fire Insurance Company and Northwest Casualty Company, had any property as to which such garnishees were required to give a certificate as provided for in ORS 29.280. Pursuant to Federal Rules of Civil Procedure, Rule 69, the trial was conducted in accordance with the practice and procedure in such cases made and provided by the statutes of the State of Oregon. Plaintiff, as the judgment creditor, appearing by her attorney, Frank McK. Bosch, the garnishee The Connecticut Fire Insurance Company appearing by one of its attorneys, Howard K. Beebe, and the garnishee Northwest Casualty Company appearing by one of its attorneys, submitted to the court an agreed statement of facts and thereafter the court heard statements and arguments by respective counsel concerning the issues to be resolved, and having considered the same and being fully advised in the premises, makes the following:

Findings of Fact

I.

The above-entitled action was commenced by the plaintiff to recover damages sustained by the estate of plaintiff's intestate as a result of said intestate's wrongful death, which occurred in an automobile accident on December 6, 1954, near The Dalles, Oregon. The trial of said action has culminated in a judgment in favor of plaintiff and against defendants, and each of them, in the sum of \$10,238.00 plus costs and disbursements taxed at \$189.70. The judgment was made and entered in the above-entitled court on June 7, 1955, and no part thereof has been paid.

II.

That on December 6, 1954, the defendant Charles Cox, also known as Charlie Cox, was the named insured in a policy of bodily injury liability and property damage liability insurance which had been issued by garnishee Connecticut Fire Insurance Company as policy No. ACC 10763, to which was attached an endorsement approved by the Public Utilities Commissioner of the State of Oregon (MP-944), and that said policy and said endorsement were in full force and effect on December 6, 1954.

III.

That on December 6, 1954, the defendant Charles Cox, also known as Charlie Cox, was the named insured in a policy of bodily injury liability and

property damage liability insurance which had been issued by garnishee Northwest Casualty Co. as policy No. 906-3892, to which was attached an endorsement approved by the Public Utilities Commissioner of the State of Oregon (MP-944), and that said policy and said endorsement were in full force and effect on December 6, 1954.

IV.

That the motor vehicles which were involved in the aforesaid accident of December 6, 1954, which were owned by defendant Charles Cox and operated by his employee, defendant Albert Earl Jones, were the following to wit:

(1) 1948 Peterbuilt tractor, motor or I.D. No. 50608, which was towing:

(2) 1952 Homemade trailer, motor or I.D. No. 173068.

That at the time of the accident the defendant Albert Earl Jones was operating said equipment from Pasco, Washington, to Portland, Oregon, for the purpose of having necessary repairs made to the tractor at Portland, Oregon; at the time and place of said accident, said equipment was not being operated as a common, private or contract carrier in the transportation of persons or property or either.

V.

That the 1952 Homemade trailer referred to in Paragraph IV hereof was specifically described in

The Connecticut Fire Insurance Company policy No. ACC 10763, but neither this policy nor policy No. 906-3892 of Northwest Casualty Company specifically described the 1948 Peterbuilt tractor referred to in Paragraph IV. The policy issued by garnishee the Connecticut Fire Insurance Company, excluded coverage under Exclusion "(c)" of its said policy as follows:

"(c) under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company;"

Based upon the above Findings of Fact, the court deduces the following

Conclusions of Law

I.

At the time and place of the accident which gave rise to the plaintiff's judgment herein, said motor vehicle equipment was not being operated under any permit issued by the Public Utilities Commissioner of Oregon or otherwise under the Motor Transportation Code of the State of Oregon. Therefore, the coverage for said accident is excluded under Exclusion "(c)" of the policy issued by The Connecticut Fire Insurance Company and the provisions of the Public Utilities Commissioner of Ore-

gon's endorsement attached thereto is not applicable to said accident and the judgment heretofore obtained by plaintiff herein.

II.

By reason of the fact that neither piece of equipment involved in said accident was described in the policy of Northwest Casualty Company and by reason of the nonapplicability of the Public Utilities Commissioner of Oregon's endorsement attached to said policy, plaintiff is not entitled to recover against garnishee Northwest Casualty Company.

III.

Plaintiff's allegations and supplemental allegations should be dismissed and plaintiff should take nothing from garnishees or either of them.

Dated this day of April, 1956.

.....,

Judge.

Service of copy acknowledged.

[Title of District Court and Cause.]

OBJECTIONS OF GARNISHEE, NORTHWEST CASUALTY CO., TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the Northwest Casualty Company, garnishee herein, and respectfully objects to the

findings of fact and conclusions of law heretofore filed by the Administratrix of the Estate of Edward S. Remillard as follows:

I.

Objects to finding number VII, upon the ground and for the reason that the policy of the Northwest Casualty Company, No. 906-3892, did not, at any time, cover the vehicles involved in the accident described in administratrix's findings of fact and conclusions of law, and that the certificate of the Public Utilities Commissioner of the State of Oregon and the endorsement attached to such policy and approved by the Public Utilities Commissioner of the State of Oregon, MP-944, did not extend coverage to the defendants Charles Cox and Albert Earl Jones for the accident described in findings of fact number I, nor was there any coverage whatsoever insofar as the garnishee Northwest Casualty Company is concerned, and further objects to said findings on the ground and for the reason that it is not a finding of fact but a proposed conclusion of law in its entirety.

II.

Objects to any finding, either in fact or in law, implied or inferred, that the vehicles involved in the accident were being operated pursuant to any permit and license issued by the Public Utilities Commissioner of the State of Oregon on the ground and for the reason that any such finding is contrary to the preponderance of the affirmative evidence in this cause and against the law; that it was not necessary

to have any permit from the Public Utilities Commissioner to operate the said vehicles over and along the highway of the State of Oregon and at the time and place of the accident, which resulted in the plaintiff's judgment herein.

III.

Objects to finding number IX on the ground and for the reason that any notice to the Northwest Casualty Company was a nullity and of no avail due to the fact that there was no coverage extended by the said Northwest Casualty Company.

IV.

Objects to conclusion of law number I on the ground and for the reason that the evidence conclusively establishes that the Northwest Casualty Company did not extend coverage for the accident which gave rise to the judgment in this cause; that the said conclusion is contrary to the affirmative evidence; that in no event should the Northwest Casualty Company be liable under its policy to this plaintiff in a greater sum than \$10,000.00 if its policy were involved, and would not be liable for the full amount of the judgment as in this conclusion recited.

V.

Objects to conclusion of law number II on the ground and for the reason that there is no competent or conclusive evidence supporting any judgment against this garnishee and for the further reason that the evidence conclusively and affirma-

tively shows that the policy of this garnishee did not cover the said accident and further shows that this garnishee is not liable to the plaintiff for any sum whatsoever.

/s/ W. K. PHILLIPS,

W. K. Phillips and Wm. C. Ralston, Attorneys for
Garnishee Northwest Casualty Company.

Service of copy acknowledged.

[Endorsed]: Filed April 20, 1956.

[Title of District Court and Cause.]

GARNISHEE NORTHWEST CASUALTY COM-
PANY'S PROPOSED OTHER, ADDI-
TIONAL AND AMENDED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

This matter coming on regularly for trial before the Honorable William G. East, Judge of the above-entitled court, on April 5, 1956, to determine whether the garnishees, The Connecticut Fire Insurance Company and Northwest Casualty Company, had any property as to which such garnishees were required to give a certificate as provided for in ORS 29.280. Pursuant to Federal Rules of Civil Procedure, Rule 69, the trial was conducted in accordance with the practice and procedure in such cases made and provided by the statutes of the State of Oregon. Plaintiff, as the judgment creditor, appearing by her attorney, Frank McK. Bosch,

the garnishee The Connecticut Fire Insurance Company appearing by one of its attorneys, Howard K. Beebe, and the garnishee Northwest Casualty Company appearing by Wm. C. Ralston, submitted to the court an agreed statement of facts and thereafter the court heard statements and arguments by respective counsel concerning the issue to be resolved, and having considered the same and being fully advised in the premises, makes the following

Findings of Fact

I.

The above-entitled action was commenced by the plaintiff to recover damages sustained by the estate of plaintiff's intestate as a result of said intestate's wrongful death, which occurred in an automobile accident on December 6, 1954, near The Dalles, Oregon. The trial of said action has culminated in a judgment in favor of plaintiff and against defendants, and each of them, in the sum of \$10,238.00 plus costs and disbursements taxed at \$189.70. The judgment was made and entered in the above-entitled court on June 7, 1955, and no part thereof has been paid.

II.

That on December 6, 1954, the defendant Charles Cox, also known as Charlie Cox, was the named insured in a policy of bodily injury liability and property damage liability insurance which has been issued by garnishee Connecticut Fire Insurance Company as policy No. ACC 10763, to which was

attached an endorsement approved by the Public Utilities Commissioner of the State of Oregon (MP-944), and that said policy and said endorsement were in full force and effect on December 6, 1954.

III.

That on December 6, 1954, the defendant Charles Cox, also known as Charlie Cox, was the named insured in a policy of bodily injury liability and property damage liability insurance which had been issued by garnishee Northwest Casualty Co. as policy No. 906-3892, to which was attached an endorsement approved by the Public Utilities Commissioner of the State of Oregon (MP-944), and that said policy and said endorsement were in full force and effect on December 6, 1954.

IV.

That the motor vehicles which were involved in the aforesaid accident of December 6, 1954, which were owned by defendant Charles Cox and operated by his employee, defendant Albert Earl Jones, were the following, to wit:

(1) 1948 Peterbuilt tractor, motor or I.D. No. 50608, which was towing;

(2) 1952 Homemade trailer, motor or I.D. No. 173068.

That at the time of the accident the defendant Albert Earl Jones was operating said equipment from Pasco, Washington, to Portland, Oregon, for the purpose of having necessary repairs made to

the tractor at Portland, Oregon; at the time and place of said accident, said equipment was not being operated as a common, private or contract carrier in the transportation of persons or property or either.

V.

That the vehicles involved in this accident were not covered by the policy of the Northwest Casualty Company specifically described as No. 906-3892, and that the said vehicles were not being used and operated under any permit issued by the Public Utilities Commissioner of the State of Oregon under the Motor Transportation Code of the State of Oregon, and that said endorsement did not extend coverage to this accident.

Based upon the above Findings of Fact, the court deduces the following

Conclusions of Law

I.

That at the time and place of the accident which gave rise to the plaintiff's judgment herein, the said motor vehicle equipment was not being operated under any permit issued by the Public Utilities Commissioner of the State of Oregon or otherwise under the Motor Transportation Code of the State of Oregon.

II.

That the insurance policy issued by the garnishee Northwest Casualty Company did not cover the defendants in the accident which gave rise to this

judgment and that the provisions of the Public Utilities Commissioner of Oregon's endorsement attached thereto does not extend coverage and is not applicable to the said accident resulting in the judgment heretofore obtained by the plaintiff herein.

III.

That the plaintiff's allegations and supplemental allegations should be dismissed and the plaintiff should take nothing from the garnishees herein or either of them.

IV.

That the garnishee Northwest Casualty Company is not liable under its policy for any amount whatsoever to this plaintiff.

Dated this day of April, 1956.

.....,
Judge.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter coming on regularly for trial before the Hon. William G. East, Judge of the above-entitled court, on April 5, 1956, to determine whether the garnishees, Connecticut Fire Insurance Company and Northwest Casualty Company, had any property as to which such garnishees were

required to give a certificate as provided for in O.R.S. 29.280. Pursuant to Federal Rules of Civil Procedure, Rule 69, the trial was conducted in accordance with the practice and procedure in such cases made and provided by the statutes of the State of Oregon. Plaintiff, as the judgment creditor, appearing by her attorney, Frank McK. Bosch, the garnishee, Connecticut Fire Insurance Company, appearing by one of its attorneys, Howard K. Beebe, and the garnishee, Northwest Casualty Company, appearing by one of its attorneys, William C. Ralston. The parties, by and through their respective attorneys, submitted to the Court an agreed statement of facts and thereafter the court heard statements and arguments by respective counsel concerning the issues to be resolved, and having considered the same and being fully advised in the premises, requested counsel for the plaintiff to draw appropriate Findings of Fact and Conclusions of Law in conformity with a letter opinion of the Court, and there being objections to said counsel's proposed Findings and Conclusions, and the Court having heard the statements and arguments of counsel concerning the same, now on its own behalf, makes the following.

Findings of Fact

I.

The above-entitled action was commenced by the plaintiff to recover damages sustained by the estate of plaintiff's intestate as a result of said in-

testate's wrongful death, which occurred in an automobile accident on December 6, 1954, near The Dalles, Oregon. The trial of said action has culminated in a judgment in favor of plaintiff and against defendants, and each of them, in the sum of \$10,238.00, plus costs and disbursements taxed at \$189.70. The judgment was made and entered in the above-entitled Court on June 7, 1955, and no part thereof has been paid.

II.

That on December 6, 1954, the defendant Charles Cox, also known as Charlie Cox, was the named insured in a policy of bodily injury liability and property damage liability insurance which has been issued by garnishee, Connecticut Fire Insurance Company as Policy No. ACC 10763, and which policy had among its provisions "Exclusion (c)" reading as follows:

"(c) under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company;"

III.

That on December 6, 1954, the defendant, Charles Cox, also known as Charlie Cox, was the named insured in a policy of bodily injury liability and property damage liability insurance which had been

issued by garnishee, Northwest Casualty Co., as Policy No. 906-3892, and which policy had among its provisions "Exclusion (c)" reading as follows:

"(c) under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company;"

IV.

That under date of October 4, 1954, the garnishee, Connecticut Fire Insurance Company, issued and filed with the Public Utilities Commissioner of the State of Oregon, at Salem, Oregon, its "Certificate of Insurance" wherein it certified that it had issued to Charlie Cox the policy of automobile bodily injury liability and property damage liability insurance therein described and being the aforesaid Policy No. ACC 10763 to provide the coverage and security for the protection of the public required with respect to the operation, maintenance, ownership or use of motor vehicles under permit issued to the named insured, or otherwise under the Motor Transportation Code and the pertinent rules and regulations of the Public Utilities Commissioner of Oregon, regardless of whether such motor vehicles are specifically described in the policy or not. The liability of the said company extends to all loss, damage, injuries or deaths whether occurred on the

route or in the territory authorized to be served by the named insured or elsewhere within the State of Oregon, which certificate was effective from September 10, 1954, to June 15, 1955.

V.

Under date of October 6, 1954, the garnishee, Northwest Casualty Company, issued and filed with the Public Utilities Commissioner of the State of Oregon, at Salem, Oregon, its "Certificate of Insurance" wherein it certified that it had issued to Charlie Cox the policy of automobile bodily injury liability and property damage liability insurance therein described and being the aforesaid Policy No. 906-3892, to provide the coverage and security for the protection of the public required with respect to the operation, maintenance, ownership or use of motor vehicles under permit issued to the named insured, or otherwise under the Motor Transportation Code and the pertinent rules and regulations of the Public Utilities Commissioner of Oregon, regardless of whether such motor vehicles are specifically described in the policy or not. The liability of the said company extends to all loss, damage, injuries or deaths whether occurred on the route or in the territory authorized to be served by the named insured or elsewhere within the State of Oregon, which certificate was effective from September 10, 1954, to March 19, 1955.

VI.

That as a result of the filing of the aforesaid certificates of insurance there was attached to and

forming a part of each of the aforesaid insurance policies issued by the garnishees, Connecticut Fire Insurance Company, and Northwest Casualty Company, respectively, an endorsement approved by the Public Utilities Commissioner of Oregon (MP-944) and said endorsements were in full force and effect on December 6, 1954.

VII.

That the motor vehicles which were owned by the defendant, Charles Cox, and operated by his employee, the defendant, Albert Earl Jones, and which were involved in the aforesaid accident of December 6, 1954, were the following:

(1) 1948 Peterbuilt tractor, motor or I.D. No. 50608, which was towing

(2) 1952 Homemade trailer, motor of I.D. No. 173068.

Further, at the time of the aforesaid accident, said defendant, Albert Earl Jones, was operating said equipment on the route from Pasco, Washington, to Portland, Oregon, for the purpose of having made to the tractor necessary repairs at Portland, Oregon, which repairs were proper and necessary in order that the said tractor should be kept fit for operation in connection with its business as a common carrier for which the aforesaid certificates of insurance were filed with the Public Utilities Commissioner of the State of Oregon, by the two garnishees, respectively.

VIII.

That the 1952 Homemade trailer referred to in Paragraph VII hereof was specifically described in Connecticut Fire Insurance Company policy #ACC 10763, but neither this policy nor policy #906-3892 of Northwest Casualty Company specifically described the 1948 Peterbuilt tractor referred to in Paragraph VII.

IX.

That a writ of execution has heretofore been issued by the Clerk of the above-entitled Court and pursuant thereto a notice of garnishment has been served upon the garnishee, Connecticut Fire Insurance Company, and notice of garnishment has been served upon the garnishee, Northwest Casualty Company.

X.

That on or about June 27, 1955, the plaintiff notified the garnishees, Connecticut Fire Insurance Company and Northwest Casualty Company, of entry of judgment referred to in Paragraph I hereof and demanded settlement and satisfaction thereof. That more than six months have expired since said notification and demand and the garnishees have refused to make any payment on said judgment.

XI.

That a reasonable attorney's fee for the plaintiff to recover herein is in the amount of Three Hundred Fifty Dollars (\$350.00).

Based upon the above Findings of Fact, the Court deduces the following

Conclusions of Law

I.

That the aforesaid certificates of insurance issued and filed with the Public Utilities Commissioner of the State of Oregon by the garnishees, respectively, are a binding statutory obligation running in favor of the public and particularly the plaintiff's decedent herein on account of bodily injuries resulting from the operation of the vehicle referred to on the highway of the State of Oregon, in the maximum sum of Ten Thousand Dollars (\$10,000.00) with the right of equal contribution between them.

II.

That the plaintiff is entitled to recover judgment against the garnishees, Connecticut Fire Insurance Company and Northwest Casualty Company, jointly and severally, in the sum of Ten Thousand Dollars (\$10,000.00) together with interest thereon at the rate of six (6) per cent per annum from June 27, 1955, until paid, and the further sum of Three Hundred Fifty Dollars (\$350.00) attorney's fees, and for plaintiff's costs and disbursements of action to be taxed, with the right of equal contribution between them.

Dated April 25, 1956.

/s/ WILLIAM G. EAST,
U. S. District Judge.

[Endorsed]: Filed April 25, 1956.

In the District Court of the United States
for the District of Oregon

Civil No. 7891

AGNES H. REMILLARD, Administratrix of the
Estate of Edward S. Remillard, Deceased,

Plaintiff,

vs.

CHARLES COX and ALBERT EARL JONES,

Defendants;

CONNECTICUT FIRE INSURANCE COM-
PANY,

Garnishee;

NORTHWEST CASUALTY CO.,

Garnishee.

JUDGMENT

Based upon the Findings of Fact and Conclusions
of Law heretofore duly made and filed herein,

It Is Hereby Considered, Adjudged and Ordered,
that the plaintiff have and recover judgment against
the Garnishees, Connecticut Fire Insurance Com-
pany and Northwest Casualty Company, jointly and
severally, in the sum of Ten Thousand Dollars
(\$10,000.00) together with interest thereon at the
rate of six (6) per cent per annum from June 27,
1955, until paid, and the further sum of Three Hun-
dred Fifty Dollars (\$350.00) attorney's fees, and
for plaintiff's costs and disbursements of action to

be taxed, with the right of equal contribution between them.

Dated April 25, 1956.

/s/ WILLIAM G. EAST,
U. S. District Judge.

[Endorsed]: Filed April 25, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF GARNISHEE CON-
NECTICUT FIRE INSURANCE COMPANY

Notice is hereby given that Connecticut Fire Insurance Company, garnishee above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 25, 1956.

/s/ HOWARD K. BEEBE,
Attorney for Appellant.

[Endorsed]: Filed May 23, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

(Agnes H. Remillard)

Notice Is Hereby Given that Agnes H. Remillard, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from

that portion of the judgment entered in this action on April 25, 1956, which restricts the plaintiff's recovery against the above-named garnishees to the sum of Ten Thousand Dollars (\$10,000.00).

/s/ FRANK McK. BOSCH,
Attorney for Appellant,
Agnes H. Remillard.

[Endorsed]: Filed May 24, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF NORTHWEST
CASUALTY CO., GARNISHEE

Notice is hereby given that Northwest Casualty Co., garnishee above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 25, 1956.

/s/ WM. C. RALSTON,
Of Attorneys for Appellants.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Comes now appellant and files this, its statement of points on which appellant intends to rely on the appeal of this cause, to wit:

(1) The trial court erred in concluding as a matter of law as follows, to wit:

“Conclusions of Law

“I.

“That the aforesaid certificates of insurance issued and filed with the Public Utilities Commissioner of the State of Oregon by the garnishees, respectively, are a binding statutory obligation running in favor of the public and particularly the plaintiff’s decedent herein on account of bodily injuries resulting from the operation of the vehicle referred to on the highway of the State of Oregon, in the maximum sum of Ten Thousand Dollars (\$10,000.00) with the right of equal distribution between them.

“II.

“That the plaintiff is entitled to recover judgment against the garnishees, Connecticut Fire Insurance Company and Northwest Casualty Company, jointly and severally, in the sum of Ten Thousand Dollars (\$10,000.00) together with interest thereon at the rate of six (6) per cent per annum from June 27, 1955, until paid, and the further sum of Three Hundred Fifty Dollars (\$350.00) attorney’s fees, and for plaintiff’s costs and disbursements of action to be taxed, with the right of equal contribution between them.”

upon the ground and for the reason that there is not competent or substantial evidence to support a judgment against appellant, Connecticut Fire In-

insurance Company, and upon the further ground that the evidence affirmatively shows that appellant, Connecticut Fire Insurance Company, is not liable to plaintiff in any sum whatsoever, inasmuch as it demonstrates that the insurance policy of appellant excluded coverage for the accident which gave rise to plaintiff's judgment, and that the vehicles involved in the accident were not being operated pursuant to any permit issued by the Public Utilities Commissioner of the State of Oregon.

Respectfully submitted this 1st day of June, 1956.

/s/ HOWARD K. BEEBE,

Of Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed June 1, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS OF NORTHWEST CASUALTY COMPANY

Appellant Northwest Casualty Co. intends to rely upon the following points in the appeal of the above-entitled cause, namely:

I.

The vehicles involved in the accident were not covered by the policy of the Northwest Casualty Co. as described in Policy No. 906-3892, and further said vehicles were not being used and operated

under any permit issued by the Public Utilities Commissioner of the State of Oregon under the Oregon Motor Transportation Code and the Public Utilities Commissioner's endorsement did not extend coverage to the accident.

1. The trial court should have made the findings that the equipment was not being operated as a common, private or contract carrier and that the vehicles were not being used under any Public Utilities Commissioner permit as requested and proposed in findings numbers 4 and 5 of the Northwest Casualty Co.

2. The trial court erred in concluding as a matter of law as follows:

“Conclusions of Law

“I.

“That the aforesaid certificates of insurance issued and filed with the Public Utilities Commissioner of the State of Oregon by the garnishees, respectively, are a binding statutory obligation running in favor of the public and particularly the plaintiff's decedent herein on account of bodily injuries resulting from the operation of the vehicle referred to on the highway of the State of Oregon, in the maximum sum of Ten Thousand Dollars (\$10,000.00) with the right of equal contribution between them.”

II.

The evidence established that at the time of the accident, the vehicles and equipment of the defend-

ant Charles Cox were on the highway for the purpose of being taken to Portland for needed repairs and that there was no hauling of goods or passengers under the provisions of the Public Utilities Commission permit issued by the State of Oregon.

1. The Court erred in concluding as a matter of law that:

“II.

“That the plaintiff is entitled to recover judgment against the garnishees, Connecticut Fire Insurance Company and Northwest Casualty Company, jointly and severally, in the sum of Ten Thousand Dollars (\$10,000.00) together with interest thereon at the rate of six (6) per cent per annum from June 27, 1955, until paid, and the further sum of Three Hundred Fifty Dollars (\$350.00) attorney’s fees, and for plaintiff’s costs and disbursements of action to be taxed, with the right of equal contribution between them.”

III.

The Court erred in not entering a judgment in favor of the appellant Northwest Casualty Co.

/s/ WM. C. RALSTON,
Of Attorneys for Appellant Northwest Casualty
Company.

[Endorsed]: Filed June 6, 1956.

In the District Court of the United States for the
District of Oregon

Civil No. 7891

AGNES H. REMILLARD, Administratrix of the
Estate of EDWARD S. REMILLARD, De-
ceased,

Plaintiff,

vs.

CHARLES COX and ALBERT EARL JONES,
Defendants,

NORTHWEST CASUALTY COMPANY, a Cor-
poration, and CONNECTICUT FIRE IN-
SURANCE COMPANY, a Corporation,

Garnishees.

DEPOSITION OF CHARLES COX

Be It Remembered that heretofore, to wit, on
Thursday, February 2, 1956, at 2:00 o'clock p.m., at
the offices of Messrs. Ryan & Pelay, Attorneys at
Law, Equitable Building, Portland, Oregon, pursu-
ant to stipulation and agreement of counsel for the
respective parties hereto, the matter of the taking
of the deposition of Charles Cox, one of the de-
fendants, called for examination in behalf of the
plaintiff and the garnishees, came regularly on be-
fore Roscoe F. Hunt, a Notary Public for the State
of Oregon.

(Deposition of Charles Cox.)

Appearances:

FRANK McK. BOSCH, ESQ.,

Of Attorneys for Plaintiff.

JOHN D. RYAN, ESQ.,

Of Attorneys for Defendant Cox. [1*]

WM. C. RALSTON, ESQ.,

Of Attorneys for Defendant Northwest Casualty Company.

HOWARD K. BEEBE, ESQ.,

Of Attorneys for Defendant Connecticut Fire Insurance Company.

STIPULATION

(It was stipulated and agreed by and between the attorneys for the respective parties that the deposition of Charles Cox, one of the defendants, may be taken in behalf of the plaintiff and the garnishees, as an adverse party at the offices of Messrs. Ryan & Pelay, Equitable Building, Portland, Oregon, on Thursday, February 2, 1956, beginning at the hour of 2:00 o'clock p.m., before Roscoe F. Hunt, a Notary Public for Oregon and in shorthand by the said Roscoe F. Hunt.

It was further stipulated and agreed that the deposition, when transcribed, may be used on the trial of the case as by law and Rules of Civil Procedure for the District Courts of the United States

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Charles Cox.)

provided, that all questions as to notice of time and place of taking the deposition are waived, that all objections as to the form of the questions are waived unless objected to at the time the questions are asked, and that all objections as to materiality, relevancy, and competency of the testimony are reserved to the parties until the time of the trial.

It was further stipulated and agreed that the reading and signing of the deposition by the witness are waived.) [2]

CHARLES COX

one of the defendants, was thereupon called for examination on behalf of plaintiff and the garnishees, and after having been duly sworn by the notary was examined and testified as follows, to wit:

Direct Examination

By Mr. Bosch:

Mr. Bosch: Mr. Cox, this deposition is taken in connection with a proceeding which is supplemental to the judgment which has been entered in this case of Agnes H. Remillard, administratrix of the estate of Edward S. Remillard, deceased, against Charles Cox and Albert Earl Jones. I represent, as you know, Mrs. Remillard, the judgment creditor. We are concerned today in inquiring into the matter of the trip which the tractor and trailer were on at the time of the accident of December 6, 1954.

Q. Now do you recall what time that tractor

(Deposition of Charles Cox.)

and trailer left Pasco, Washington, on December 6, 1954?

A. Well, I wasn't there at the time but they tell me it left approximately at nine o'clock.

Q. When did you last talk to Mr. Jones, your driver, before the accident?

A. I don't recall when I last talked to him.

Q. Did Mr. Jones before the trip with the tractor and trailer have instructions from you as to making this trip to Portland?

A. Oh, yes. [3]

Q. What instructions did he have in regard to making the trip?

A. To take the truck to the Oregon Truck Sales or to the Buda place in Portland.

Q. Now this truck you refer to, can you tell us the make and year?

A. It was a 1948 Peterbilt.

Q. And this accident which occurred just outside The Dalles on December 6, 1954, involved that truck and trailer, did it not? A. Yes.

Q. And at the time of the accident the Peterbilt tractor was hauling a home-made trailer?

A. Yes, a pulling trailer.

Q. Now this trailer was it loaded or empty?

A. The trailer was empty.

Q. Can you tell us why your driver had a tractor and trailer on this trip when his intention was to have repairs made only on the tractor in Portland?

A. Well, I might say that the tractor is joined

(Deposition of Charles Cox.)

to the trailer and it stays that way practically all the time. And then there is the possibility that I might have him bring back something from Portland or we might have a load to come back from this part of the country before we got through; and I instructed him, I told him I would come to Portland and I would meet him in Portland at one of these places. [4]

Q. So the arrangement was that Jones was to bring the tractor and trailer to Portland for repairs on the tractor and he was to await your arrival in Portland before returning to Pasco?

A. Yes.

Q. On the day of the accident where were you?

A. On the day of the accident I was in Seattle.

Q. And when did you intend to come to Portland?

A. Tuesday morning.

Q. That would be what date?

A. The morning of the 7th of December.

Q. After the accident did the tractor and the trailer continue on down to Portland?

A. No, they sent it back to Pasco.

Q. And I assume you didn't come to Portland then?

A. No, I went back to Pasco.

Q. Did you have any other business in the Pasco area other than running this hauling business?

A. Well, I have a service station at Pasco.

Q. Do you have a farm in that area?

A. Yes, I have a farm in that area.

Q. Do you run that yourself?

A. Yes.

(Deposition of Charles Cox.)

Q. The farm? A. Yes.

Q. Now will you tell us again what you anticipated doing with [5] your tractor and trailer after you met Mr. Jones here in Portland?

A. What I——

Q. What you expected to do if there had not been an accident?

A. Well, we possibly would send him back to Pasco, or I might have had something for him to take back to Pasco, or it is possible we might have got a load.

Q. When you say you expected he might have hauled something back to Pasco did you think he might haul some of your property back to Pasco?

A. Yes, he might have hauled some of my property back to Pasco, I was thinking about buying a farm tractor.

Q. And that would be for use on your farm in the Pasco area? A. Yes.

Q. Now what kind of repairs did you have to have made on this tractor?

A. The injectors needed cleaning and setting.

Q. Couldn't that work have been done in Pasco?

A. I don't know of anyone there that could do that kind of work in Pasco; it is a sort of a specialized job, and I still don't know anyone in Pasco that can do it.

Mr. Bosch: I think that's all at this time, Mr. Cox.

(Deposition of Charles Cox.)

Further Direct Examination

By Mr. Beebe:

Q. As I understand, in the first place, removing this trailer [6] or disconnecting it involves quite a bit of work, isn't that right?

A. That's right, it involves some work, it is not a major job, you have to jack it up and put timbers under it and so forth and pull the tractor out from under the trailer.

Q. And so that at the time you dispatched Mr. Jones to come down here and have that work done you didn't have anything definite in mind about bringing the tractor and trailer back up there, it might go back empty, or when you got to Portland you might buy your own farm trailer and haul it back, or on the other hand you might get a load to haul back? A. That's right.

Q. As a common carrier? A. Yes.

Q. And as far as that is concerned when the trip started out you didn't know under what circumstances the tractor and trailer would come back?

A. No. But if I had come to Portland I believe I would have bought a farm tractor, I later did buy this farm tractor that I was figuring on before the accident interrupted it.

Q. You believe if you had come down here you would have bought a farm tractor and taken it back?

A. From what I know now I believe I would

(Deposition of Charles Cox.)

have made the deal, but at that moment I wasn't sure I would make the deal, but when I did get to Portland I did make a deal. [7]

Q. But you can't say actually you would have made such a deal?

A. No, I can't say that I actually would have made such a deal, I couldn't say that at that time I would, but I can say looking back I am pretty sure I would have.

Q. So so far as this trip down to Portland is concerned there might have been any one of three things occur, the truck and trailer could dead-head back, or it could take back a farm tractor that you wanted to have hauled out to your farm, or there was a possibility that there was a haul from Longview or some place that you would pick up and have a load going back to Pasco? A. Yes.

Mr. Beebe: That's all.

Further Direct Examination

By Mr. Ralston:

Q. Mr. Cox, about how much work was involved in taking the trailer off the tractor, jacking it up and so forth, how many hours?

A. A couple of hours.

Q. A couple of hours?

A. Yes, a couple of hours. Then it rides better if it has a weight on it, that is, the boys don't like to ride in the tractor without the trailer, it rides better with the trailer attached.

(Deposition of Charles Cox.)

Q. It would take two hours to disconnect it and a little longer [8] to put it together wouldn't it?

A. Well, approximately so.

Q. And the trailer couldn't have been used while the tractor was in Portland anyway? A. No.

Q. And you felt the simplest thing would be to leave the tractor and trailer attached?

A. I didn't think so much about it, the boys would not be going any place with the tractor that they would have taken the trailer off, no.

Q. And you gave them no instructions one way or the other? A. No, sir.

Mr. Ralston: No further questions.

Mr. Ryan: We have no questions except this that I will ask you: Mr. Cox, you have a right under the federal rules to read this deposition and sign it after you have read it, and you would be permitted to make such changes as you would wish in your testimony. You also have the right to waive that privilege of reading and signing the deposition, and I would advise you that you should waive it if you wish to.

The Witness: All right, what ever you suggest.

Mr. Ryan: All right, say you waive the reading and signing of the deposition.

The Witness: Yes, I waive the reading and signing of the deposition.

(Deposition concluded.)

(Signature waived.)

[Endorsed]: Filed March 2, 1956. [9]

CERTIFICATE OF CLERK

United States of America,
District of Oregon

I, R. DeMott, clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Allegations of Plaintiff; Answer of Garnishee, Connecticut Fire Insurance Company to Allegations of Plaintiff; Answer of Garnishee, Northwest Casualty Co.; Answer of Northwest Casualty Company to Supplemental Allegations; Supplemental Allegations of Plaintiff; Answer of Garnishee, Connecticut Fire Insurance Company to Allegations of Plaintiff; Reply of Plaintiff to Answers of Garnishee, Connecticut Fire Insurance Co.; Reply of Plaintiff to Answers of Garnishee, Northwest Casualty Company; Agreed Statement of Facts; Objections of Garnishee, Connecticut Fire Insurance Co. to Proposed Findings of Fact, etc.; Proposed Additional and Amended Findings of Fact, etc., of Garnishee, Connecticut Fire Insurance Company (not filed); Objections of Garnishee, Northwest Casualty Co. to Proposed Findings of Fact, etc.; Proposed Additional and Amended Findings of Fact, etc., of Garnishee, Northwest Casualty Company (not filed); Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal of Garnishee, Connecticut Fire Insurance Company; Supersedeas Bond on Appeal; Notice of Appeal of Agnes H. Remillard; Undertaking on Appeal—Costs; Order Approving Supersedeas Bond of Connecticut Fire Insurance Company; Designation of

Record of Connecticut Fire Insurance Company; Statement of Points on Which Appellant Intends to Rely; Order Extending Time to File Notice of Appeal; Notice of Appeal of Northwest Casualty Co.; Supersedeas Bond on Appeal; Additional Designation of Record on Appeal of Northwest Casualty Co.; Statement of Points of Northwest Casualty Company; and Transcript of Docket Entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7891, in which Agnes H. Remillard, Administratrix of the Estate of Edward S. Remillard, Deceased; Connecticut Fire Insurance Company and Northwest Casualty Co. are both appellants and appellees; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellants and appellees, and in accordance with the rules of this court.

I further certify that the cost of filing the notices of appeal, \$15 has been paid by the appellants and appellees.

I further certify that the deposition of Charles Cox will be forwarded as soon as the order authorizing its transmittal is filed in this office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 26th day of June, 1956.

[Seal]

R. DE MOTT,
Clerk,

By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 15182. United States Court of Appeals for the Ninth Circuit. Connecticut Fire Insurance Company, Appellant, vs. Agnes H. Remillard, Administratrix of the Estate of Edward S. Remillard, Deceased. Agnes H. Remillard, Administratrix of the Estate of Edward S. Remillard, Deceased, Appellant, vs. Connecticut Fire Insurance Company, and Northwest Casualty Co., Appellees. Northwest Casualty Co., Appellant, vs. Agnes H. Remillard, Administratrix of the Estate of Edward S. Remillard, Deceased, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Oregon.

Filed June 27, 1956.

Docketed July 5, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for
the Ninth Circuit

No. 15182

CONNECTICUT FIRE INSURANCE COM-
PANY,

Appellant,

vs.

AGNES H. REMILLARD, Administratrix of the
Estate of Edward S. Remillard, Deceased,

Appellee.

APPELLANT CONNECTICUT FIRE INSUR-
ANCE COMPANY'S DESIGNATION AND
ADOPTION OF STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Comes now appellant Connecticut Fire Insurance Company and designates and adopts as its statement of points upon which it will rely the statement of points appearing in the typewritten record on file herein, and further designates and adopts as its designation of record, the designation of record appearing in the typewritten record on file herein.

/s/ HOWARD K. BEEBE,
Of Attorneys for Appellant, Connecticut Fire In-
surance Company.

Service of copy acknowledged.

[Endorsed]: Filed July 6, 1956.

United States Court of Appeals for
the Ninth Circuit

No. 15182

AGNES H. REMILLARD, Administratrix of the
Estate of Edward S. Remillard, Deceased,

Appellee,

vs.

CHARLES COX and ALBERT EARL JONES,

Defendants,

CONNECTICUT FIRE INSURANCE COM-
PANY, Garnishee,

Appellant,

NORTHWEST CASUALTY CO., Garnishee,

Appellant.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD OF THE APPELLANT
NORTHWEST CASUALTY COMPANY

Comes now the Northwest Casualty Co., one of
the appellants herein, and adopts as its statement
of points upon which it intends to rely, the state-
ment of points filed in the District Court on June
6th, 1956, and

For its Designation of Record, hereby adopts its

designation of record filed in the District Court on June 6th, 1956.

/s/ WM. C. RALSTON,
Of Attorneys for Appellant Northwest Casualty
Company.

Service of copy acknowledged.

[Endorsed]: Filed July 9, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANT, AGNES H. REMILLARD, AD-
MINISTRATRIX, INTENDS TO RELY

Comes now Agnes H. Remillard, Administratrix of the estate of Edward S. Remillard, deceased, and files this, her statement of points on which appellant intends to rely on the appeal of this cause, to wit:

I.

The trial court erred in concluding as a matter of law in that portion of its Conclusions of Law as hereinafter underlined, to wit:

“Conclusions of Law

“I.

“That the aforesaid certificates of insurance issued and filed with the Public Utilities Commissioner of the State of Oregon by the garnishees, respectively, are a binding statutory obligation run-

ning in favor of the public and particularly the plaintiff's decedent heerin on account of bodily injuries resulting from the operation of the vehicle referred to on the highway of the State of Oregon, in the maximum sum of Ten Thousand Dollars (\$10,000.00) with the right of equal contribution between them.

“II.

“That the plaintiff is entitled to recover judgment against the garnishees, Connecticut Fire Insurance Company and Northwest Casualty Co., jointly and severally, in the sum of Ten Thousand Dollars (\$10,000.00) together with interest thereon at the rate of six (6) per cent per annum from June 27, 1955, until paid, and the further sum of Three Hundred Fifty Dollars (\$350.00) attorney's fees, and for plaintiff's costs and disbursements of action to be taxed, with the right of equal contribution between them” upon the grounds and for the reason that the trial court made findings of fact that both of the insurance policies issued by the respective garnishees were in force and effect on the date of the accident, each for \$10,000.00, and therefore the trial court should have rendered judgment against each of the garnishees in the sum of \$10,000.00 together with interest, costs and attorneys' fees of \$350.00, but limiting the recovery of plaintiff from the garnishees to the sum of \$10,-427.70 (the amount of the original judgment plus costs) plus interest thereon from June 27, 1955, and costs and attorneys' fees in the instant proceeding, and with the provision that as between the gar-

nishees each should be liable to the other for any amount paid by it to plaintiff in excess of one-half of said judgment of \$10,427.70, plus interest, costs and attorneys' fees.

/s/ FRANK McK. BOSCH,
Of Attorneys for Agnes H. Remillard, Administra-
trix of the Estate of Edward S. Remillard,
Deceased.

Service of copy acknowledged.

[Endorsed]: Filed July 9, 1956.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL
BY APPELLANT, AGNES H. REMIL-
LARD, ADMINISTRATRIX

Agnes H. Remillard, having filed her notice of appeal from the judgment in the above-entitled matter, hereby expressly adopts as her designations of record, the designations of record heretofore made by Connecticut Fire Insurance Company and Northwest Casualty Co. appearing in the type-written record on file herein.

/s/ FRANK McK. BOSCH,
Of Attorneys for Appellant, Agnes H. Remillard,
Administratrix of the Estate of Edward S.
Remillard, Deceased.

Service of copy acknowledged.

[Endorsed]: Filed July 9, 1956.



No. 15,181

In the
United States Court of Appeals
For the Ninth Circuit

v. 2977

JOHN P. DALEY, MINERVA B. DALEY, MORRIS
DALEY, ZELMA B. DALEY, WILLIAM RAD-
TKE, CLARA RADTKE and HOMER BOSSE,
Trustee of the Estates of Morris K. Daley,
Alice M. Daley, Susan R. Daley, James D.
Daley, Kathryn F. Daley and Peter D. Daley,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Supplemental Brief

ERIC SUTCLIFFE

WILLIAM D. McKEE

ORRICK, DAHLQUIST, HERRINGTON
& SUTCLIFFE

405 Montgomery Street
San Francisco 4, California

Attorneys for Appellants

FILED
MAR 28 1957
PAUL P. O'BRIEN, CL

SUBJECT INDEX

	Page
I. Introduction	1
II. Summary of Appellants' Position.....	2
III. Argument	4
1. The Regulations have not been interpreted to limit the completed contract method of accounting to contracts of 12 months' duration.....	4
2. The completed contract method of accounting is particularly applicable to contracts of short duration.....	12
Conclusion	21

TABLE OF AUTHORITIES CITED

CASES	Pages
Anderson-Dougherty-Hargis Co., Inc. v. U. S. (N.D. Cal., 1950), 96 F. Supp. 404.....	6
Bent v. Comm'r (9th Cir., 1932), 56 F.2d 99, affirming 19 BTA 181	4, 5, 9, 13
Birkemeier v. Comm'r (1939), 39 BTA 1072.....	5
Black, E. E., Ltd. v. Alsup (9th Cir., 1954), 211 F.2d 879.....	9, 10
Brown & Root, Inc. v. Scofield (W.D. Texas, 1953), 53-1 USTC 9361, 44 A.F.T.R. 1325.....	6
Burnet v. Sanford & Brooks Co., 282 U.S. 359, 51 S.Ct. 150, 152, 75 L.Ed. 383.....	14, 18
Cameron, Joyce & Co. v. U. S. (S.D. Iowa, 1937), 38-1 USTC 9168, 22 A.F.T.R. 1229	5
Chapin Construction Co. v. Comm'r (1925), 3 BTA 25.....	6
Crump, Edward, Jr. Inc. v. Comm'r (3rd Cir., 1948), 169 F.2d 725	11, 20, 21
Ehret-Day Co. v. Comm'r (1943), 2 T.C. 25.....	6
Ellis, James C. (1929), 16 BTA 1225.....	4
Fort Pitt Bridge Works v. Comm'r (1931), 24 BTA 626, aff'd (3rd Cir., 1937), 92 F.2d 825, certiorari denied 303 U.S. 659.....	2, 6
Hammond, Ross B., Inc. v. Comm'r (9th Cir., 1938), 97 F.2d 545, 36 BTA 497 at 502.....	9, 10
Harrison v. Heiner (W.D. Penn., 1928), 28 F.2d 985.....	6
Hegeman-Harris Co. v. United States (Court of Claims, 1938), 23 F. Supp. 450.....	5
Jones v. Smith (10th Cir., 1952), 193 F.2d 381, certiorari denied 343 U.S. 952.....	6
Jud Plumbing & Heating, Inc. v. Comm'r, (5th Cir., 1946), 153 F.2d 681, aff'g 5 T.C. 127.....	6
Key Largo Shores Properties, Inc. v. Comm'r (1930), 21 BTA 1008	12
Lakeside Petroleum Co. v. U. S. (N.D. Ill.), (1932), 1 F. Supp. 31..	5, 14
National Builders v. Comm'r (1949), 12 T.C. 852.....	6
Orino v. Comm'r (1936), 34 BTA 726.....	6
Patterson, B. F. v. Comm'r (1930), 21 BTA 8.....	6, 9

	Pages
Reynolds Cattle Co. v. Comm'r (1934), 31 BTA 206.....	12
Standard Paving Co. v. Comm'r (10th Cir., 1950), 190 F.2d 330, aff'g 13 T.C. 425, certiorari denied 342 U.S. 860.....	6
Vang v. Lewellyn (3rd Cir., 1929), 35 F.2d 283.....	6
Wells, L. A., Construction Co. v. Comm'r, 46 BTA 302, aff'd (6th Cir., 1943) 134 F.2d 623, certiorari denied 319 U.S. 771.....	2, 6, 7, 8, 9

OTHER AUTHORITIES

Internal Revenue Code (1939):

Section 41	3, 6, 11
Section 736(b)	19, 20

Treasury Regulations:

Art. 36 of Regs. 45.....	4
Art. 36 of Regs. 62, 65 and 69.....	5
Art. 334 of Regs. 74 and 77 (1932 Act).....	5
Art. 42-4 of Regs. 94 and 101.....	5
Sec. 19.41-2 of Regs. 103.....	3
Sec. 19.42-4 of Regs. 103.....	2, 3, 4, 6, 18, 20
Sec. 1.446-1 of Proposed Regulations, 1954 Code.....	3
Sen. Rep. No. 1631, 77th Cong., 2d Sess. (1942), p. 208 (1942-2 Cum. Bull. 657).....	19
54 Columbia Law Review 1267 (1954).....	12
Accounting Research Bulletin No. 19 of American Institute of Accountants	17
Finney, General Accounting (1941), page 252.....	18
Gilman, Accounting Concepts of Profit (1939), pages 114-116.....	15
Holmes, Auditing Principles and Procedure (Revised Edition, 1947), page 577.....	18
94 Jo. of Accountancy 708 (December, 1952).....	12
Kester, Advanced Accounting (4th Ed., 1946), page 401.....	18
Montgomery, Auditing Theory and Practice, Vol. II (1922), pages 487-489	16
Wagman, "Tax Accounting for Long-Term Contracts" 33 Taxes— The Tax Magazine 277 (April, 1955).....	12

No. 15,181

In the
United States Court of Appeals
For the Ninth Circuit

JOHN P. DALEY, MINERVA B. DALEY, MORRIS
DALEY, ZELMA B. DALEY, WILLIAM RAD-
TKE, CLARA RADTKE and HOMER BOSSE,
Trustee of the Estates of Morris K. Daley,
Alice M. Daley, Susan R. Daley, James D.
Daley, Kathryn F. Daley and Peter D. Daley,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Supplemental Brief

I.

INTRODUCTION

Under date of March 5, 1957, this Court requested counsel for both parties to file additional briefs on the question whether income may be reported on a completed contract basis where the contract, as here, is for a lesser term than one year.

As noted by this Court, this subject was not treated by either side in the earlier briefs filed herein. Appellants considered that

the issue of whether the Regulations prohibited the use of the completed contract method for contracts of less than 12 months duration had been settled by the case of *L. A. Wells Construction Co. v. Comm'r*, 46 BTA 302, aff'd (6th Cir., 1943), 134 F.2d 623, certiorari denied 319 U.S. 771.¹ In addition, Appellants believed that no such issue would or could be raised by the United States in this case, since Daley Brothers, during its many years in the construction business, had never performed a contract which took more than 12 months to complete, and yet the United States had stipulated that they had always kept their books and reported their income from construction contracts on the completed contract basis (Tr. 18).

In Appellants' brief in the District Court, the *L. A. Wells Construction Co.* case and the case of *Fort Pitt Bridge Works v. Comm'r*, 24 BTA 626, aff'd on this issue (3rd Cir., 1937), 92 F.2d 825, certiorari denied 303 U.S. 659, were cited with respect to the point, and Appellee cited no contrary authority. It seemed clear from the opinion of the District Court (at Tr. 105) that this issue, if there ever was one, was decided in favor of Appellant. Consequently, this question was not raised in Appellants' Statement of Points on Appeal (Tr. 251). The only authority addressed directly to the matter in the briefs before this Court is the single sentence in the language from the *Fort Pitt Bridge Works* case quoted on page 9 of Appellants' Opening Brief: "The contracts need not run for more than a year".

II.

SUMMARY OF APPELLANTS' POSITION

The Appellants do not rely and have not relied in their briefs upon Section 19.42-4² of the Regulations in claiming the right to

1. This is the case referred to by counsel for Appellants at the trial before the District Court. See Tr. 121.

2. The court has cited the regulation as "Regs. 111 (1943), Sec. 29.42-4." Regulations 111 were not effective until Oct. 26, 1943. Thus it is believed that Regs. 103 (1939), Sec. 19.42-4 were applicable for 1942. However, the language of both regulations is the same.

use the completed contract method of accounting for the Delta contract. Instead, they rely upon Section 41 of the Internal Revenue Code, reading as follows:

"The net income shall be computed * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income."

and upon Regs. 103, Section 19.41-2 which says:

"Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income."³

As will be seen, there are a large number of cases holding that the completed contract method of accounting is a method generally employed by construction contractors for contracts of less than 12 months duration, and that it clearly reflects income. Accordingly, it meets the statutory test of Section 41 of the Code.

So far as appears, the Commissioner has not argued in any of the decided cases that Reg. Sec. 42-4 is intended to limit the use of the completed contract method of accounting to contracts taking longer than 12 months to complete. On the contrary, the cases show that he has many times asserted, *with respect to contracts of less than 12 months duration*, that in his opinion the completed contract method of accounting must be used because required by the statute.

-
3. cf. Sec. 1.446-1 of the Proposed Regulations under the 1954 Code: "^{*} ^{*} ^{*} A method of accounting which reflects the consistent application of generally accepted accounting principles in a particular trade or business in accordance with accepted conditions or practices in that trade or business will ordinarily be regarded as clearly reflecting income provided all items of income and expense are treated consistently from year to year."

III.

ARGUMENT

1. The Regulations have not been interpreted to limit the completed contract method of accounting to contracts of more than 12 months duration.

In order to place the many cases concerning this subject in proper perspective, the cases must be read in the light of the language of the Regulations in effect from time to time.

The earliest Regulations relating to construction contracts authorized the completed contract method without regard to the duration of the contract.⁴

Accordingly, several of the cases decided under the 1918 Act which hold that the completed contract method of accounting is applicable to contracts of less than 12 months duration, actually relied upon the completed contract Regulations in so holding.⁵

Starting with the Regulations under the 1921 Act, and thereafter until Regulations 103 were issued under the 1939 Code, all the Regulations defined long-term contracts as construction con-

4. Art. 36 of Regulations 45, applicable to the 1918 Act, provided as follows:

"Art. 36. *Long-term contracts*.—Persons engaged in contracting operations, who have uncompleted contracts, *in some cases perhaps* running for periods of several years, will be allowed to prepare their returns so that the gross income will be arrived at on the basis of completed work; that is, on jobs which have been finally completed any and all moneys received in payment will be returned as income for the year in which the work was completed. * * *" [Italics added.]

5. E.g. *Bent v. Comm'r* (9th Cir., 1932), 56 F.2d 99 affirming 19 BTA 181 (where the Board said "The fact that some of the contracts were performed within a year and some took longer, creates no inconsistency in the method and does not detract from a clear reflection of income"). The record on appeal in the *Bent* case reveals that the "Huntington Park Reservoir" job was started in September, 1920 and was completed in February, 1921 (R. 164) and that the "Rodeo Drain" job was started in October, 1920 and was completed in March, 1921 (R. 165). See also *James C. Ellis* (1929), 16 BTA 1225 (contract entered into in July, 1920 and completed prior to March 14, 1921, court holds the "long-term contract" regulations are applicable.)

tracts "covering a period in excess of one year."⁶ It appears that some of the cases decided during this period by the lower courts construed this language to mean that a "long-term contract" was one "covering a period including portions of two fiscal years" or "spanning a year end", rather than requiring that the contract take more than 12 months from start to finish. *Birkemeier v. Comm'r* (1939), 39 BTA 1072, 1074: ("The Commissioner determined that the Tanner Creek contract was a long term contract"—Tanner Creek job lasted only 10 months); *Hegeman-Harris Co. v. United States* (Court of Claims, 1938), 23 F. Supp. 450; *Lakeside Petroleum Co. v. U. S.* (N.D. Ill., 1932) 1 F. Supp. 31, 32; *Cameron, Joyce & Co. v. U. S.* (S.D. Iowa, 1937) 38-1 USTC 9168, 22 A.F.T.R. 1229.⁷

In addition to these cases, however, there are also a number of cases decided during this period upholding the completed contract method of accounting, or conceding that it may be used, without regard to the contract's duration without relying upon, and in

6. Art. 36 of Regulations 62 (1921 Act), 65 (1924 Act) and 69 (1929 Act); Art. 334 of Regulations 74 (1928 Act), and 77 (1932 Act); Art. 42-4 of Regulations 94 (1936 Act) and 101 (1938 Act):

"Long-term Contracts.—Income from long-term contracts is taxable for the period in which the income is determined, such determination depending upon the nature and terms of the particular contract. As used in this article, the term 'long-term contracts' means building, installation, or construction contracts covering a period in excess of one year. Persons whose income is derived in whole or in part from such contracts may, as to such income, prepare their returns upon either of the following bases:

(a) Gross income derived from such contracts may be reported upon the basis of percentage of completion. * * *

(b) Gross income may be reported for the taxable year in which the contract is finally completed and accepted if the taxpayer elects as a consistent practice so to treat such income, provided such method clearly reflects the net income. * * *

7. See also *Bent v. Comm'r*, *supra*, in which the Regulations under the 1918 Act were sustained by this Court as applied to contracts of less than 12 months on the basis of reasoning that subsequent Revenue Acts made no change in the governing statutory provisions. It would seem to follow that the Court believed that the Regulations under the subsequent Revenue Acts were not intended to, and *could not* effect a change in the treatment of contracts of less than 12 months.

some cases without even citing, the Regulations relating to construction contracts. *L. A. Wells Construction Co. v. Comm'r* (1942), 46 BTA 302, aff'd (6th Cir., 1943), 134 F.2d 623, certiorari denied 319 U.S. 771; *Vang v. Lewellyn* (3rd Cir., 1929), 35 F.2d 283; *Harrison v. Heiner* (W.D. Penn., 1928), 28 F.2d 985; *Chapin Construction Co. v. Comm'r* (1925), 3 BTA 25, 27; *B. F. Patterson v. Comm'r* (1930), 21 BTA 8 (petitioner's practice was to complete work by last of November, Commissioner argues books kept on completed contract basis); *Fort Pitt Bridge Works v. Comm'r* (1931), 24 BTA 626, 641, aff'd on this issue (3rd Cir., 1937) 92 F.2d 825, certiorari denied 303 U.S. 659; *Orino v. Comm'r* (1936), 34 BTA 726. The *Orino* case said it was immaterial whether the contract was "long-term", because Section 41 of the statute governs.

Additional cases involving contracts of less than one year have been decided subsequent to the adoption of Regulations 103 Sec. 19.44-2 defining a "long-term contract" as one which covers "a period in excess of one year from the date of execution of the contract to the date on which the contract is finally completed and accepted." *Jones v. Smith* (10th Cir., 1952), 193 F.2d 381, certiorari denied 343 U.S. 952; *Standard Paving Co. v. Comm'r* (10th Cir., 1950), 190 F.2d 330, aff'g 13 T.C. 425 (facts show "Gruber" and "Dalhart" projects each lasted only 7 months), certiorari denied 342 U.S. 860; *Jud Plumbing & Heating, Inc. v. Comm'r* (5th Cir., 1946), 153 F.2d 681, aff'g 5 T.C. 127 (used completed contract method for all contracts over \$100); *National Builders v. Comm'r* (1949), 12 T.C. 852, 858; *Ehret-Day Co. v. Comm'r* (1943), 2 T.C. 25, 32; *Brown & Root, Inc. v. Scofield* (W.D. Texas, 1953), 53-1 USTC 936, 44 A.F.T.R. 1325; *Anderson-Dougherty-Hargis Co., Inc. v. U. S.* (N.D. Cal., 1950), 96 F. Supp. 404.

Of the many cases previously cited which hold or clearly indicate that the completed contract method of accounting is applicable to all construction contracts, without regard to duration, the *L. A. Wells Construction Co.* case is perhaps the most explicit in its

reasoning and is the leading case on the subject. The pertinent facts were clearly expressed in the opinion of the Board of Tax Appeals, as follows (46 BTA at 305):

"The petitioner contends that it kept its books and filed its income tax returns on the accrual basis; that the Buffalo contract, which did not contemplate or require in excess of twelve months for completion, was not a 'long-term' contract as defined by the respondent's regulations, and that therefore the deduction of \$61,031.40 taken in its 1937 return as a reserve for loss should be allowed in order to clearly reflect its income. The respondent contends that, since the petitioner has consistently reported its taxable income from contracts begun in one year and completed in the following year on the complete contract basis, and since the Buffalo project was not completed until 1938, the allowance of the deduction sought by the petitioner would result in a distortion of its taxable income for both 1937 and 1938.

"* * * From the evidence it is apparent that the petitioner accounted for and reported its income by the completed contract method. So far as disclosed, the respondent has consistently accepted such method as correctly reflecting the petitioner's income and, we think, properly so. *H. Stanley Bent, supra*; *Alfred E. Badgley*, 21 B.T.A. 1055; *aff'd* 59 Fed. (2d) 203; *Russell G. Finn, Executor*, 22 B.T.A. 799; *Fort Pitt Bridge Works*, 24 B.T.A. 626; *affirmed* on this point, 92 Fed. (2d) 825; *certiorari denied*, 303 U.S. 659; *D. L. Wheelock*, 10 B.T.A. 540.

"With respect to the Buffalo project the petitioner, under the guise of a reserve for loss, seeks to depart from its established practice of accounting for and reporting income and to deduct in its 1937 return an amount representing a prorated portion of its total estimated loss on the project. Where, as here, the method of accounting employed by the taxpayer clearly reflects income, to permit such departure would not result in the petitioner's net income being computed 'in accordance with the method of accounting regularly employed in keeping the books of such taxpayer', as is required by the statute. Sec. 41, Revenue Act of 1936. The allowance of such departure would, as respondent contends, result in a distortion of income for both 1937 and 1938. We are of the opinion that the action of the respondent with respect to this

issue is correct, and it is therefore sustained. *Russell G. Finn, Executor, supra.*

"The petitioner contends * * * that the Buffalo contract did not cover a period in excess of one year and that to hold as applicable here the completed-contract method of reporting income involved in said decisions and specifically provided for in Article 42-4(b) of Regulations 94, would nullify the obvious intent of the regulations as disclosed in the definition of long term contracts. It is true that the decisions in the cases mentioned, except the *Badgley* case, involved taxable years controlled by the Revenue Act of 1918. However, the *D. L. Wheelock* case involved years controlled by the 1918 and 1921 Acts and the *Badgley* case involved years controlled by the Revenue Acts of 1921, 1924 and 1926. The regulations under all acts since the Act of 1918 contain the same definition of long term contracts as appears in Article 42-4 of Regulations 94. The rule in the above mentioned cases is grounded not on the length of time covered by the contracts, but on the taxpayer's method of keeping books and reporting income, and, as we said in the *Bent* case, 'The fact that some of the contracts were performed within a year and some took longer creates no inconsistency in the method and does not detract from a clear reflection of income' ".

It should be noted that the *L. A. Wells Construction Co.* case was affirmed by the Court of Appeals for the Sixth Circuit "upon the grounds and for the reasons set forth in the opinion of the Board." 134 F.2d 623. Certiorari was denied by the United States Supreme Court, 319 U.S. 771.

The *Wells* case is also an example of the cases emphasizing the importance of consistency in the application of accounting methods in order to avoid distortion of the income of the taxpayer from year to year. Regardless of what may be said in favor of the District Court's view that Daley Brothers Delta Venture was an entity apart from the Daley Brothers partnership, the effect of singling out the Delta contract and requiring that Appellants' report income from that contract on the accrual basis would be to *impose inconsistency* upon them, rather than to *uphold consistency*. Daley Brothers Delta Venture was not a taxpayer. The partnership return

which was required from it was for informational purposes only. The testimony was that the taxpayers, the individual plaintiffs, had consistently used the completed contract method since 1921 and thereafter until the time of the trial (Tr. 189-190).

It is of particular significance that in the *L. A. Wells Construction Co.* case no argument was made by the Commissioner that his Regulations prohibited the use of the completed contract method of accounting for contracts of less than 12 months. On the contrary, the Commissioner argued that if the accrual method, rather than the completed contract method, was used by the taxpayer for its short-term contracts, income would not be clearly reflected. The court agreed.

As a matter of fact, *no* case has been found from which it appears that the Commissioner has argued that the completed contract method of accounting may not be used for contracts taking less than 12 months to complete. On the other hand, there are many cases in addition to the *Wells* case in which the Commissioner has required or attempted to require that the taxpayer use the completed contract method of accounting for contracts of less than 12 months on the grounds that this was the only method which would clearly reflect income. Among these are *Bent v. Comm'r* (9th Cir., 1932), 56 F.2d 99, aff'g 19 BTA 181; *B. F. Patterson* (1930), 21 BTA 8; *Birkemeier v. Comm'r* (1939), 39 BTA 1072; and *Anderson-Dougherty-Hargis Co. v. U. S.* (N.D. Cal., 1950), 96 F. Supp. 404.

In addition to the *Bent* case, which has been previously cited and discussed, there are two other 9th Circuit cases involving the long-term contract regulations. These cases are *Ross B. Hammond Inc. v. Comm'r* (9th Cir., 1938), 97 F.2d 545, and *E. E. Black, Ltd. v. Alsop* (9th Cir., 1954) 211 F.2d 879. Neither case is directly related to the issue discussed in this brief, but both of these cases also support Appellants' position.

The *Hammond* case involved a long-term contract. The taxpayer had been on the completed contract method of accounting and had switched to the percentage of completion method for the particular

long-term contract involved, without either obtaining the consent of the Commissioner or submitting the certificates of architects or engineers required by the regulations in order to show the percentage of completion. Accordingly, it was held that the taxpayer was not entitled to use the percentage of completion method since these requirements had not been met. While the particular contract involved in the *Hammond* case appears to have had a duration of more than 12 months, it is clear from the opinion of the Board of Tax Appeals (36 BTA, 497 at 502) that taxpayer had used the completed contract method for *all* construction contracts, and not only for those extending over a period of more than 12 months. The transcript of the record on appeal in the *Hammond* case confirms this. (Stip. of Facts IV, VI, X; Tr. of Rec. pages 16-19).

The case of *E. E. Black, Ltd. v. Alsop*, which has been discussed in the previous briefs, is the case holding that the regulation requires final completion and acceptance, rather than substantial completion. The record in that case shows that the contract there involved was entered into on July 28, 1944 and that it was substantially completed on April 27, 1945, a period of less than one year. (Tr. of Rec., pages 25-26). It was finally completed and accepted in 1946.

The Government argued in the *Black* case that "final completion and acceptance" as used in the Regulation meant "substantial completion", and that since the contract was substantially completed on April 27, 1945, the profit from the contract should have been reported in 1945 on the completed contract basis. Thus, there was implicit in the Government's argument that the completed contract method was available for a contract of less than 12 months. Putting the matter another way, if the Government had been correct that "final completion and acceptance" means "substantial completion", and if the regulations prohibit the use of the completed contract method for contracts of less than 12 months, then the contract involved in the *Black* case would not have qualified for completed contract treatment, and, as a matter of fact, the taxpayer would have been required to report a portion of the in-

come from the contract on the accrual or cash basis as of December 31, 1944! There is no inkling in the briefs or in the court's opinion that this was an issue that was or ought to have been before the court. It also demonstrates the administrative difficulties that would be presented if the question of whether the completed contract basis could be used depended upon whether the contract happened to take more or less than 12 months to complete. In almost all cases, of course, the contractor does not know in advance on what date the contract will be finally completed and accepted. In many cases, therefore, he would not know, at the time his tax return was required to be filed for a year in which he commenced work on a contract, whether he was entitled to use the completed contract method of accounting for that contract (and thus defer the income) or whether he would be required to show partial results in his return. Certainly if the Regulation is, at this late date, to be interpreted in such a manner as to create an administrative burden of this type, it would be incumbent upon the Appellee to present to this Court the most cogent and persuasive reasons for sustaining its validity. Moreover, the consistent interpretation and concession by the Commissioner that his regulation does *not* prevent the use of the completed contract method for short term contracts, which runs throughout all the previous cases, should be persuasive that the regulation was not *intended* to do so.

Appellants treated the Delta contract as if it had been completed in 1942. If this court agrees with Appellants that this can be fairly characterized only as an application of the completed contract method of accounting,⁸ then Section 41 of the Code and the foregoing cases clearly establish Appellants' right to correctly apply that method. The fact that the Delta contract was completed in less than 12 months is irrelevant.

Section 41 also says that if (i) the taxpayer did not regularly employ a method of accounting, or if (ii) the method employed did not clearly reflect the income, then the computation shall be

8. See *Edward Crump, Jr. Inc. v. Comm'r* (3rd Cir., 1948), 169 F.2d 725 discussed *infra*, page 20.

made by a method which "in the opinion of the Commissioner,"⁹ clearly reflects the income. Unless the method employed in connection with the Delta contract was the completed contract method, it was *neither* "regularly employed" nor did it "clearly reflect the income."¹⁰ Since the above cases are clear evidence that in the opinion of both the Commissioner and the courts the completed contract method of accounting clearly reflects the income from short term contracts, Appellants' right of recovery by that method is clear under the statute.

2. The completed contract method of accounting is particularly applicable to contracts of short duration.

Certainly, the foregoing demonstrates that the cases overwhelmingly support the position that the completed contract method of accounting is appropriate for contracts of less than 12 months duration.¹¹ However, the cases contain little, if any, basic analysis of the problem. Moreover, there has been no indication in the cases or elsewhere of *why* the Regulations deal only with contracts requiring more than 12 months to complete. It is Appellants' contention that analysis will show that the completed contract method of accounting is actually *more* appropriate in the case of short term construction contracts than in the case of long-term contracts, and that the reason why the regulations do not also deal with construction contracts of less than 12 months is related not to the completed contract method of accounting referred to in those

9. If the taxpayer wishes to correct his return by switching from a method which does not reflect income to one which does, the Commissioner may not withhold his consent simply because more tax would be collected from the erroneous method. *Key Largo Shores Properties, Inc. v. Comm'r* (1930), 21 BTA 1008; *Reynolds Cattle Co. v. Comm'r* (1934), 31 BTA 206.

10. In addition to the authorities cited in Appellants' previous briefs, see the general discussion in the Note, "Clearly Reflecting Income," 54 Columbia Law Review 1267 (1954).

11. As for the commentators, see, e.g., "Can Completed Contract Basis Be Used for All Jobs Extending into Two Taxable Years?" 94 Jo. of Accountancy 708 (December 1952); Wagman "Tax Accounting for Long-Term Contracts" 33 Taxes—The Tax Magazine 277 (April, 1955).

regulations, *but to the percentage of completion method*, which the regulations say is an alternative method of accounting available only in the case of long-term contracts.

There are, so far as is known to Appellants, only two reasons why the completed contract method of accounting is used almost universally by construction contractors for both tax and other purposes. Perhaps the principal reason, as stated by this court in the *Bent* case (quoted at page 27 of Appellants' Opening Brief), is that because of the nature of contracting operations it cannot be known what the profit or loss may be until the contract is completed or accepted. See also GCM 7998, IX-2 CB 206 in which the General Counsel for the Bureau of Internal Revenue made the same point, as follows:

"One of the reasons why permission to report on a completed contract basis is given in the case of building, installation, and construction contracts is the fact that there are changes in the price of articles to be used, losses and increased costs due to strikes, weather, etc., penalties for delay, and unexpected difficulties in laying foundations which make it impossible for any construction contractor, no matter how carefully he may estimate, to tell with any certainty whether he has derived a gain or sustained a loss until a particular contract is completed."

This reason, on its face, is one which is applicable to any construction contract which spans a year end, and not only to those contracts which also last for more than 12 months. As a matter of fact, one of the four contracts involved in the *Bent* case took only 6 months to complete, while another was of only 5 months duration (See footnote 5 *supra*).

The second, and in some cases even more persuasive reason for the use of the completed contract method of accounting, is the frequent lack of correlation under the terms of such contracts between the expenses incurred by the contractor and the payments made by the owner to the contractor. When payments lag behind costs, as they did in connection with the Delta contract, distortion is bound to follow if the books are closed on the job for an interim period

prior to final acceptance. This is the point made in paragraph 2 of Accounting Research Bulletin No. 45, and in the article from the Journal of Accountancy, which are quoted, respectively, in footnotes 8 and 9 on pages 14 and 15 of Appellants' Closing Brief. See also *Lakeside Petroleum Co. v. U. S.* (N.D. Illinois), 1 F. Supp. 31, at 32 where, after quoting the regulation, the court says:

"In other words, long-term contracts were contracting operations where work was done under the contract and expenditures and expenses were incurred thereunder often in different years from the time payments were received by the contractors."

See also *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 51 S. Ct. 150, 152, 75 L.Ed. 383, where this aspect of the completed contract method of accounting is discussed and approved.

It seems patent, also, that this second reason for the use of the completed contract method of accounting is applicable to any construction contract which spans a year end, and not only to those contracts which also last for more than 12 months. As a matter of fact, one would suspect that the shorter the period of the contract, the less likelihood is there that correlation between expenses and progress payments will be attempted, since the contractor will not have long to wait for full payment in all events.

We have seen that the reasons why the completed contract method of accounting is used by contractors are equally persuasive for all construction contracts, without regard to duration. But how about the disadvantages of the completed contract method of accounting? Do these apply equally to both long and short term contracts?

There are several disadvantages to the completed contract method of accounting, both for the contractor and for the tax collector. From the contractor's standpoint, the completed contract method of accounting, when applied to a profitable contract, may bunch the earnings from several years' activities into a single taxable period. The result, of course, would be a larger tax than would otherwise be payable, because of the progressive rate structure. If the contract is not profitable, the result may be to lump a large loss

all into one year, which otherwise might have been used to offset income earned from other sources in several years.

From the standpoint of the revenues, the disadvantage of the completed contract method of accounting is that it may delay for several years the time for the payment of taxes. In a sense, the contractor is financing his operations out of delayed tax payments.

From a simple statement of these disadvantages, it is apparent that the completed contract method of accounting is *more* appropriate for contracts lasting *less* than 12 months. The disadvantages are all directly proportional to the length of the contract!

Why, then, do the regulations refer only to contracts lasting for more than 12 months? And since the Commissioner consistently agrees that the completed contract method of accounting should be used for contracts lasting less than 12 months, why aren't the regulations expanded to cover all construction contracts, without regard to duration?

The answer to these questions lies in an appreciation of the fact that the regulation deals with an accounting problem, and is intended to clarify a doubtful question of accounting procedure. In the case of short term contracts there is no dispute among accountants—the use of anything other than the completed contract method of accounting for short term lump sum construction contracts is heresy! No regulation is necessary to tell the accountant or the courts that the completed contract method meets the tests of the statute when applied to short term contracts. In the case of long term contracts, however, there are competing considerations. Theoretically, no income is earned until the contract is completed and accepted. And because of the hazards of the construction business the conservative approach is to wait until the contract is completed before estimating profits. But the disadvantages of the completed contract method when applied to contracts of extended duration create pressures on the accountant to make annual estimates of the profit earned, based on the percentage of completion.

The accountants' dilemma is clearly expressed in the literature. For example in Gilman, *Accounting Concepts of Profit* (1939), at

pages 114-116, we find the following review of the authorities and the problem:

"CONSTRUCTION CONTRACTS. An interesting income problem is noted in connection with large construction contracts. Montgomery has described the problem in the following words:

'* * * a contractor might be engaged for a period of three years on a single large project to the exclusion of all other work. If his books were kept on a completed contract basis, he would show losses in the first two years, and the third year would reflect the profit of three years' operations.'

"Referring to the same type of situation, Kester intimates that: 'To withhold profits, if earned, until the completion of the contract might work a real injustice.' The injustice mentioned must refer to injustice to stockholders, particularly in the case of those companies whose shares are actively traded. A practical income tax problem also is involved which may well be one of the factors of injustice.

"Sweeney, in his *Stabilized Accounting*, clearly recognizes that the treatment of unfinished long-term contracts is an exception to the general rule and asserts that this exception is for the sake of expediency.

* * *

"The common recognition of interim income on long-term contracts is undoubtedly fair to all concerned, stockholders, management, creditors, and government. Any change to a more rigorous basis might result in burdensome tax inequity. None the less, it must be insisted that such interim profit estimates under the bare conditions set forth are not only not 'true earnings' but are not, as a matter of fact, realized earnings at all."

In Montgomery, *Auditing Theory and Practice* Vol. II (1922), at pages 487-489 ("Contractors' Accounts"), the following is found:

"INCOME TAX RETURNS.—For income tax purposes contractors can elect to return as income only those amounts

received in payment of jobs finally completed, as brought out in Article 36, Regulations 62, quoted below:

[Quoting the Regulations under the 1918 Act]

* * *

"While this method protects the contractor, in that it minimizes the possibility of paying taxes on profits which may not be earned, yet it is hardly fair in the case of a large building contract extending over several fiscal years. In the latter case it can hardly be claimed to be improper to take at least a part of the profit on the work already done provided the percentage of the work completed has been estimated on a conservative basis and a liberal allowance has been made for contingencies. * * *

"After all, however, the best method, except in the cases above mentioned, is to ignore entirely profits which may have accrued on uncompleted contracts."

Accounting Research Bulletin No. 19 of the American Institute of Accountants also sets forth the accountants approach. In paragraph 1 is found the following:

"In the case of manufacturing, construction or service contracts, profits are not ordinarily recognized until the right to full payment has become unconditional, i.e., when the product has been delivered and accepted, when the facilities are completed and accepted, or when the services have been fully and satisfactorily rendered. This accounting procedure has stood the test of experience and should not be departed from except for cogent reasons.

It is, however, a generally accepted accounting procedure to accrue revenues under certain types of contracts, and thereby recognize profits, on the basis of partial performance, where the circumstances are such that aggregate profit can be estimated with reasonable accuracy and ultimate realization is reasonably assured. *Particularly where the performance of a contract requires a substantial period of time from inception to completion, there is ample precedent for pro rata recognition of profit as the work progresses, if the total profit and the ratio of performance to date to complete performance can be reasonably computed and collection is reasonably assured. Depending upon the circumstances*

such partial performance may be established by deliveries, expenditures or percentage of completion otherwise determined. *This rule is frequently applied to long-term construction and other similar contracts.*" [Italics added.]

The other leading accounting authorities are to the same effect. See Kester, *Advanced Accounting* (4th Ed., 1946) at page 401; Finney, *General Accounting* (1941) at page 252; Holmes, *Auditing Principles and Procedure* (Revised Edition, 1947), at page 577.

With this background, Regulation 103 Sec. 19.42-4 makes considerably more sense. It tells the taxpayer and his accountant that in the case of construction contracts lasting for more than 12 months the percentage of completion method is available, despite the fact that it results in the reporting of income not earned and losses not sustained. It also tells the taxpayer and his accountant that the completed contract method may still be used in the case of such long term contracts, despite the fact that the use of such method for such contracts may result in the deferral of taxes for an extended period of time.¹² Without this guide in the Regulations it might be expected that taxpayers, accountants and the courts would all have considerable difficulty in weighing the competing practical considerations applicable to long term construction contracts against the theoretical tests of income realization and the requirements of revenue collection on an annual basis.¹³ *There are no competing factors in the case of short term contracts. Everything points to the completed contract method as the only acceptable method, and so regulations are unnecessary.*

12. Compare the first sentence of Sec. 42-4(a) with the first sentence of 42-4(b):

"(a) Gross income derived from such contracts may be reported upon the basis of percentage of completion."

"(b) Gross income may be reported for the taxable year in which the contract is finally completed and accepted *if the taxpayer elects as a consistent practice so to treat such income, provided such method clearly reflects the net income.*" [Italics added.]

13. See, e.g. *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 51 S. Ct. 150, 75 L. Ed. 383.

The accounting authorities previously cited are not the only support for Appellants' rationale of the regulations relating to construction contracts. Congress itself provided strong support for this interpretation when, in 1942, it enacted Section 736(b) of the Internal Revenue Code, relating to the excess profits tax. This section was designed to permit corporations using the completed contract method for income tax purposes to switch, in the case of long-term contracts only, to the percentage of completion method for excess profits tax purposes because of the distortion which would result in excess profits net income from lumping the earnings of several years into the year of completion.¹⁴ The relevant portions of this section of the Code provided as follows:

"(b) Election on long-term contracts.—In the case of any taxpayer computing income from contracts the performance of which requires more than 12 months * * * it may elect * * * to compute, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, such income upon the percentage of completion method of accounting. * * *".

There are two extremely interesting aspects of this language. In the first place, it is clear from the Committee report quoted in footnote 14 that the relief was intended to be given only because the completed contract method of accounting, when applied to contracts of more than 12 months duration, would unfairly bunch income. Yet the section is not, by its terms, limited to taxpayers who had used the completed contract method of accounting in "computing income from contracts". It is respectfully suggested that a fair inference is that Congress believed

14. See Sen. Rep. No. 1631, 77th Cong., 2d Sess. (1942), p. 208 (1942-2 Cum. Bull. 657):

"Your committee has added a new subsection (b) to section 736 to provide relief to taxpayers reporting income from long-term contracts upon the completed contract method of accounting. Such income is bunched in the year in which it is reported and unless it is spread out over the period of the contract under which the work has been performed a distorted picture of the taxpayer's true earnings for such year is presented * * *."

that the only method available for "computing income from contracts", other than the percentage of completion method, was the completed contract method.

The other significant feature of this section is that Congress itself provided that for excess profits tax purposes the percentage of completion method was available as an alternative to the completed contract method only in the case of contracts extending for a period of more than 12 months. It is Appellants' position that Regs. 103, Sec. 19.44-2 was designed to establish the same rule for income tax purposes.

One of the few cases interpreting Section 736(b) of the Excess Profits Tax Law is *Edward Crump, Jr. Inc. v. Comm'r* (3rd Cir., 1948), 169 F.2d 725. This case makes it clear that while Section 736(b) permitted the use of the percentage of completion method only for contracts taking longer than 12 months to complete, that section raised no implication that the completed contract method could be used only for such contracts. For in one breath the court noted that the taxpayer had always reported income on the completed contract method and that the only contract that it had ever had which took more than 12 months to complete was the one before the court. Thus, the court said (at pg. 726):

"The taxpayer is a Pennsylvania building construction corporation. It kept books on a calendar year basis. The income tax returns through 1942 were made on a completed contract basis. The only long-term contract as defined in Section 736(b) (performance of which requires more than twelve months) it ever had was the one in question."

The court is also respectfully requested to read the *Crump* case from the standpoint of whether the method of accounting used by Appellants in connection with the Delta contract should be designated the "accrual" method or the "completed contract" method. In the *Crump* case the contract was actually completed in 1942, but the accountant testified that the president of the company instructed him to treat it as if it were completed in 1941. The court noted that since the 1941 return "carried an estimate

of the total contract profit" it was proper to conclude that the method of accounting adopted with respect to this contract was the completed contract method of accounting. Since the contract was actually completed in 1942, rather than in 1941, the entire contract profit was held to have been properly shifted from 1941 to 1942. Counsel for Appellants have taken the liberty of referring to this aspect of the *Crumph* case in this Supplemental Brief only because of the very great similarity of the facts of that case to the facts of this one. The case was not discovered previously because it was digested under the excess profits tax law, a field not researched in connection with the previous briefs.

CONCLUSION

The completed contract method of accounting may, *and should*, be used where the contract, as here, is for a lesser period than one year.

Respectfully submitted,

ERIC SUTCLIFFE

WILLIAM D. MCKEE

ORRICK, DAHLQUIST, HERRINGTON
& SUTCLIFFE

Attorneys for Appellants

March, 1957.

